85-1301

No. 85-

Supreme Court, U.S.
FILED
JAN 30 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE HONORABLE ALCEE L. HASTINGS,
UNITED STATES DISTRICT JUDGE,
Petitioner,

v.

THE JUDICIAL CONFERENCE OF THE UNITED STATES, *et al.*,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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JANUARY 30, 1986

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5576

The Honorable ALCEE L. HASTINGS,
U.S. District Judge, APPELLANT

v.

JUDICIAL CONFERENCE
OF THE UNITED STATES, et al.

Appeal from the United States District
Court for the District of Columbia

(Civil Action No. 83-03850)

Argued April 12, 1985
Decided August 13, 1985

Terence J. Anderson, with whom John W. Karr and Robert S. Catz were on the brief, for appellant.

Brook Hedge and John Doar for appellees, Department of Justice, et al. Richard K. Willard, Joseph E. diGenova,

Sandra M. Schraibman and Harold J. Krent, entered appearances for appellee, Department of Justice.

Daniel J. Popeo and George C. Smith were on the brief for the Washington Legal Foundation, amicus curiae, urging affirmance.

Before EDWARDS and BORK, Circuit Judges, and McGOWAN, Senior Circuit Judge.

Opinion for the Court filed by Senior Circuit Judge McGOWAN. Opinion concurring in part filed by Circuit Judge EDWARDS.

Appellant, United States District Judge Alcee L. Hastings, seeks reversal of a judgment by the District Court dismissing his suit to enjoin the continuation of an investigation of his judicial conduct by an investigative committee of the Judicial Council of the Eleventh Circuit. The investigation was initiated pursuant to the Judicial Councils Reform

and Judicial Conduct and Disability Act of 1980, 28 U.S.C. §§ 331, 332, 372(c), 604 (1982) [hereinafter, "the Act"]. Appellees are the Judicial Conference of the United States; the Chief Justice of the United States, in his capacity as presiding officer of the Conference; the Standing Committee of the Judicial Conference; the Judicial Council of the Eleventh Circuit; the Chief Judge of the Eleventh Circuit; the member-judges of the Investigating Committee; and the Attorney General of the United States.

Appellant's complaint contains four counts. The first alleges that the Act is unconstitutional on separation-of-powers and due process grounds. Count Two asserts that the application of the Act to appellant violates the same constitutional principles. Count Three alleges that the Committee's investigation of Judge

Hastings is the result of a conspiracy among judges of the Eleventh Circuit to violate Hastings' constitutional rights. The final count claims that appellant's rights under the Privacy Act of 1974, 5 U.S.C. § 552a (1982), have been violated in connection with the investigation. On cross-motions for summary judgment, the District Court rejected the challenge in Count One to the facial validity of the Act. The Court dismissed Counts Two and Three as unreviewable under the explicit terms of the Act. Finally, the Court dismissed the Privacy Act count for failure to state a cognizable claim.

For the reasons hereinafter appearing, we hold that, at the time the District Court rendered its decision, adjudication of Counts One and Two was premature. We therefore vacate the District Court's grant of summary judgment

to appellees on Count One and affirm the District Court's dismissal of Count Two. We also affirm the District Court's dismissal of Counts Three and Four, although, as with Count Two, our reasons for holding these counts properly dismissed differ from those offered by the District Court.

I

The Act established a formal mechanism by which federal judges could be disciplined by fellow judges for "conduct prejudicial to the effective and expeditious administration of the business of the courts." 28 U.S.C. § 372(c)(1). "Any person" alleging such conduct on the part of a judge may set that mechanism in motion by filing with the clerk of the circuit in which the judge sits a complaint containing a "brief statement of the facts constituting such conduct." Id.

The clerk of the court must then transmit the complaint to the chief judge of the circuit (or to the next most senior active service judge of that circuit, if the chief judge is the subject of the complaint), as well as to the judge who has been named in the complaint. The chief judge, after "expeditiously reviewing a complaint," id. § 372(c)(3), may take any of several courses of action. He may dismiss the complaint if it either (1) fails to conform with the requirements for a complaint stated above, or (2) directly relates to the merits of a decision or procedural ruling, or (3) is frivolous. Id. § 372(c)(3)(A). The chief judge may also conclude the proceeding if he finds that "appropriate corrective action has been taken." Id. § 372(c)(3)(B).

If the chief judge neither dismisses the complaint nor concludes the action, he must appoint a special committee, consisting of himself plus equal members of circuit and district judges of the circuit, to investigate the facts and allegations contained in the complaint. Id . § 372(c)(4). The Act grants the committee the power to conduct an investigation "as extensive as it considers necessary." Id. §372(c)(5).

When the committee has completed its investigation, it is required to file with the judicial council of the circuit[1] "a

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1. The judicial council of each circuit is presided over by the chief judge of the circuit and consists, in addition, of a certain number of circuit and district judges of that circuit, the number to be fixed by a majority vote of the active circuit judges of that circuit in accordance with 28 U.S.C. § 332(a) (1982).

comprehensive written report . . . present[ing] both the findings of the investigation and the committee's recommendations for necessary and appropriate action by the judicial council of the circuit." Id. § 372(a)(5). Upon receiving the committee's report, the circuit judicial council may conduct any additional investigation it considers necessary. In addition, the judicial council "shall take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit." Id. § 372(a)(6)(B). Such action may include requesting that the judge voluntarily retire; ordering that, "on a temporary basis for a time certain," no further cases be assigned to the judge; and public or private censuring of the judge. Id.

Rather than take such action itself, however, the judicial council has the option of referring a complaint, along with the record of any proceedings undertaken to that point and the council's recommendations for appropriate action, to the Judicial Conference of the United States. Id. § 372(c)(7)(A).[2] The Act also requires transfer to the Judicial Conference of any case in which the circuit judicial council determines, on the basis of a complaint and an investigation under this subsection, or on the basis of "information otherwise available to the council," id. § 372(c)(7)(B), that a judge has engaged in conduct that either

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2. The Judicial Conference is composed of the chief judges of all the circuits plus a designated district judge from each circuit, and is presided over by the Chief Justice of the United States. See 28 U.S.C. § 331 (1982).

(1) might constitute one or more grounds for impeachment under Article I of the Constitution, or (2) "in the interest of justice, is not amenable to resolution by the judicial council." Id.

Having had proceedings transferred to it from a circuit judicial council via either of the above paths, the Judicial Conference, "after consideration of the prior proceedings and such additional investigation as it considers appropriate," id. § 372(c)(8), shall by majority vote, take any of the courses of action, described above, that were open to the judicial council. In addition, if the Conference determines--either on its own or upon review of the judicial council's determination--that consideration of impeachment may be warranted, it shall transmit its determination to the United

States House of Representatives "for whatever action the House of Representatives considers to be necessary." Id.

In any investigation undertaken pursuant to the Act, the investigating body, be it the special committee, the circuit judicial council, or the Conference, is vested with full subpoena powers. Id. § 372(c)(9)(A), (B); see id. §§ 331, 332(d). The Act also gives each such body the power to prescribe rules for the conduct of its proceedings, although such rules must provide certain minimum procedural safeguards.[3]

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3. Such rules shall contain provisions requiring that--

(A) adequate prior notice of any investigation be given in writing to the judge or magistrate whose conduct is the subject of the complaint;

(B) the judge or magistrate whose conduct is the subject of the the complaint be afforded an opportunity to appear (in person or by counsel) at proceedings conducted by the investigating panel, to present oral and documentary evidence, to compel the attendance of

The Act expressly limits the availability of review of orders and determinations made under the Act. See 5 U.S.C. § 372(c)(10). A petition for review may be filed with the circuit judicial council by a complainant or judge aggrieved by an order of the chief judge, pursuant to § 372(c)(3), dismissing a complaint or concluding a proceeding, see infra pp. 3-4. An aggrieved complainant or judge may also petition the Judicial Conference for review of action taken by the judicial council pursuant to § 372(c)(6). With

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3. (Continued)
witnesses or the production of documents, to cross-examine witnesses, and to present argument orally or in writing; and

(C) the complainant be afforded an opportunity to appear at proceedings conducted by the investigating panel, if the panel concludes that the complainant could offer substantial information.

228 U.S. § 372(c)(11) (1982).

these two exceptions, "all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise." Id. at § 372(c)(10).

II

As a description of the proceedings so far will reveal, little of the Act has as yet come into play. On December 29, 1981, a federal grand jury indicted appellant, a district judge in the Southern District of Florida since 1979. The indictment charged appellant with conspiracy to solicit and accept money in return for being influenced in his performance of official acts as a United States district judge. The indictment further alleged that appellant had informed his co-conspirator, one William Borders, of the substance and date of

issue of a forthcoming judicial order and that Borders had in turn passed the information on to a person he believed to be a defendant in the case involved.

After an unsuccessful motion to quash the indictment on the ground that the sole means of punishing a judge for high crimes and misdemeanors is impeachment by Congress, appellant was brought to trial. His co-conspirator had already been convicted of the conspiracy counts in a separate trial, and his conviction had been upheld against an attack on sufficiency grounds in an opinion that detailed the evidence against appellant as well as Borders. Appellant's trial, however, ended in acquittal.

On March 17, 1983, two federal district judges filed with the Eleventh Circuit a complaint under § 372 of the Act, charging that appellant had engaged

in conduct prejudicial to the effective and expeditious administration of the business of the courts and had violated several Canons of the Code of Judicial Conduct for United States Judges. The specific allegations referred both to the conduct on which the indictment rested and to other conduct and statements by appellant occurring in the course of the criminal proceedings against him.[4]

4. The complaining judges alleged that:

(1) Judge Hastings had conspired with Borders to obtain a bribe in return for an official judicial act;

(2) Judge Hastings made "public and unfounded statements" that the United States was prosecuting him on racial/political grounds;

(3) Judge Hastings knowingly and publicly exploited his judicial position or acquiesced in such exploitation by others acting on his behalf by accepting financial donations from lawyers and other members of the public to defray the costs of his criminal defense;

(4) Judge Hastings, by his own testimony, had allowed ex parte contacts between his law clerk and counsel in pending cases concerning substantive issues in those cases and concerning the content of orders and opinions not yet

On March 29, 1983, the Honorable John C. Godbold, Chief Judge of the Eleventh Circuit, appointed an investigative committee consisting of himself, two federal circuit judges, and two federal district judges. The Committee in turn appointed a private attorney as its counsel.

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4. (Continued)

entered, and had "completely abdicated and delegated" his judicial decision-making authority to his law clerk;

(5) Judge Hastings, by his own testimony, had told counsel in a judicial proceeding that he had read an important precedent when he knew he had not and explained his deception by implying that it was common for judges to make such deliberate misstatements;

(6) Judge Hastings, by his own testimony, had exploited his judicial position by soliciting funds for someone he knew was a convicted federal offender.

Hastings v. Judicial Conference of the United States, 593 F. Supp. 1371, 1376-77 (1984).

The Committee began its investigations on June 3, 1983, with the filing of a petition in the Southern District of Florida for access to the materials of the grand jury that had indicted appellant and his co-conspirator. The petition was granted over appellant's objections, and the order granting the petition was affirmed by a panel of the Eleventh Circuit. In re Petition to Inspect and Copy Grand Jury Materials, 735 F.2d 1261 (11th Cir.), cert. denied, 105 S.Ct. 254 (1984).[5]

Approximately six months after the investigation began, appellant filed this action in the United States District Court for the District of Columbia, seeking a

5. The panel was actually composed of three specially designated circuit judges from other circuits, as all of the Eleventh Circuit Judges had recused themselves from the appeal. See In re Petition, supra, at 1265 n.3.

declaration that the Act is void and an injunction against continuation of the proceedings taken against him pursuant to the Act. As stated earlier, his complaint contains four counts. The first count challenges the facial constitutionality of the Act on separation-of-powers and due process grounds. The second count attacks the constitutionality of the Act as applied to Judge Hastings. Count Three alleges that the complaint filed against Judge Hastings under § 372(c)(1) of the Act, and the proceedings thereafter initiated, are the product of a conspiracy to violate his constitutional rights. The fourth count alleges a violation of appellant's rights under the Privacy Act, 5 U.S.C. § 552a (1982).

As of the date of the District Court's decision in this case, the Investigative Committee was still at work.

No report had issued from the Committee with recommendations for disposition of the complaint.

III

In the District Court, appellant had set forth three grounds for his Count One allegation that the Act is facially unconstitutional, each of which grounds were rejected by the Court. First, appellant argued that Congress lacks the power to provide the judiciary with the means to discipline Article III judges. Under the separation-of-powers doctrine, Congress alone, through the impeachment power, may discipline judges for misconduct in office. The Act's provisions, appellant contended, represent an unlawful delegation of Congressional authority to a branch -- the judiciary -- constitutionally incapable of disciplining itself.

The District Court held that the Act does not violate the separation-of-powers doctrine because it is precisely "in order to assure the integrity and independence of the judicial branch" that these, and earlier, limitations have been placed on the independence of any individual federal judge. 593 F. Supp. at 1379. The Court stated: "The independence of the judiciary depends both on the courage and integrity of individual judges and on the public perception of the institution as fair, impartial and efficient. The judiciary has the inherent power to govern itself in a manner that will achieve these ends." Id. at 1380. The Act, the Court concluded, "represents a legitimate exercise of Congress's 'necessary and proper' power to effectuate that judicial power." Id. Rather than intrude upon judicial independence, Congress "was simply recognizing

the need to give the courts reasonable means to put the judiciary's own house in order." Id. The court also held that the impeachment provisions of Article II neither preclude the Judicial Conference from recommending to the House that particular judges be impeached nor preempts the judicial councils or the Judicial Conference from invoking the various disciplinary measures open to them under the Act.

Appellant also argued that the Act's standards of misconduct are constitutionally vague and overbroad and impermissibly chill his and all other federal judges' constitutionally guaranteed judicial independence. The District Court disagreed. According to the court, the standard set forth in § 372(c)(7)(B)(i)--i.e., "conduct which might constitute one or more grounds for impeachment" --gave

clear notice to Judge Hastings that his alleged conduct was proscribed. With respect to the alleged bribe and obstruction of justice, the Court stated that "[i]t is difficult to imagine any conduct by a judge, if it occurred, more worthy of impeachment," 593 F. Supp. at 1382, and that "'[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness.'" Id. (quoting Parker v. Levy, 417 U.S. 733, 756 (1974)). As to the standard set forth in § 372(c)(1)--i.e., "conduct prejudicial to the effective and expeditious administration of the business of the courts"--the court noted that it was "necessarily broad" and, when read in the light shed by its legislative history, was not vague. 593 F. Supp. at 1382.

Finally, appellant asserted that the procedures authorized by the Act violate his fifth amendment rights to due process of law. Specifically, he contended that the Act (1) prevents him from confronting the evidence against him, and (2) impermissibly combines investigative and adjudicatory powers, so as to render impossible a fair adjudication. The court found no merit to either of Judge Hastings' due process claims. The court read the Act to require a judge under inquiry to have the right to confront all the evidence against him, although not to give the judge the right "to re-confront old evidence at every stage where it is considered." Id. at 1383. As to the combination of investigative and adjudicatory functions, the court held that not to constitute a due process violation in itself, id. at 1384 (citing Withrow v.

Larkin, 421 U.S. 35, 58 (1975), and found Judge Hastings to have failed to make the requisite showing of unfair risk in this instance.

As to Count Two, the challenge to the constitutionality of the Act as applied to appellant, and Count Three, the conspiracy claim, the District Court held that adjudication was barred by § 372(c)(10) of the Act, which precludes judicial review of "orders and determinations" made with respect to individual judges. Regarding Count Two, the Court stated:

> While there is always a basic presumption of judicial review and a Congressional intent to preclude review must be explicit, the language of the Act and its legislative history plainly show that Congress intended to establish an absolute bar against judges under inquiry seeking judicial review of actions taken against them pursuant to the Act. Congress's power to preclude such judicial review is well established. Accordingly, this Court must conclude it has no jurisdiction over Judge Hastings' Count Two

> claims concerning the present and possible future application of the Act to him.

593 F. Supp. at 1377-78 (citations and footnotes omitted). The same reasoning applies, the Court held, to review of the Chief Judge's order to initiate that investigation, "even if Judge Hastings seeks to clothe his request for review in the language of conspiracy." 593 F. Supp. at 1384.

Addressing Count Four, the Privacy Act claim, the District Court simply found no violation of the relevant statutory provisions:

> Count Four states on its face no Privacy Act claim in regard to past actions by the Justice Department, since the Act requires neither that Judge Hastings be notified nor approve of any disclosures made. See 5 U.S.C. § 552a(b)(7), (e)(8). The Justice Department memorandum mentioned in paragraph 57 of the amended complaint merely states in most general terms matters already of public record. No violation of the regulations cited emerges. As for future

> cooperation between the Justice Department and the Investigating Committee, that has been resolved by In re Petition, 576 F. Supp. 1275 (S.D. Fla. 1983), aff'd, 735 F.2d 1261 (11th Cir. 1984). Finally, the due process allegations against the Investigating Committee defendants in Count Four represent yet another attempt by Judge Hastings to shortcircuit the exclusive review process vested by the Act in the judicial councils and the Conference, and this Court cannot consider them. See 28 U.S.C. § 372(c)(10). Thus no cause of action is stated in Count Four.

593 F. Supp. at 1385.

In support of his appeal from the District Court's ruling against his Count One claim that the Act is facially unconstitutional, Judge Hastings raises the same three arguments rejected by the District Court. Judge Hastings also appeals the District Court's unfavorable ruling on Counts Two through Four. We hold that adjudication of both Counts One and Two is premature. We affirm the

dismissal of Counts Three and Four, although for reasons different from those stated by the District Court.

IV

Count One of appellant's complaint touches matters of profound importance for the federal judicial system. The need for some means by which federal judges might "put their own house in order," Chandler v. Judicial Council, 398 U.S. 74, 85 (1970), has been recognized since 1939, when a committee of distinguished jurists chaired by Chief Justice Hughes successfully proposed the statutory organization of the judicial councils and the Judicial Conference. See id. That those bodies could constitutionally be vested with some powers by which to effect the goals of the 1939 Act seems also to be established. See id. at 86 n.7 ("We see no constitutional obstacle preventing Congress from

vesting in the Circuit Judicial Councils, as administrative bodies, authority to make 'all necessary orders for the effective and expeditious administration of the business of the courts within [each] circuit.'") Nevertheless, the precise limits to the powers that could constitutionally be exercised by the judicial councils and the Judicial Conference have yet to be judicially defined. Indeed, before the 1978 Act, no particular powers were statutorily conferred; the assumption seems to have been that the self-administrative power of the judiciary was implicit in the very structure of the judicial councils and the Judicial Conference. The Supreme Court, however, expressed discomfort with such a vague scheme in Chandler, supra,[6] and

6. Chandler involved a separation-of-powers challenge by a federal district judge to an order by the Judicial Council

Congress, in the 1980 Act, responded by vesting specific investigative and disciplinary powers in the judicial councils and the Judicial Conference.

As to each of the investigatory and disciplinary powers conferred by the Act, there may be a question of whether Congress may lawfully vest such power in an administrative organ of the federal judiciary composed of Article III judges. Regardless whether such a question may be asked, however, a court may provide an answer only in an appropriate adjudicatory setting.

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6. (Continued)
of the Tenth Circuit finding the judge unable or unwilling to discharge his duties efficiently and directing that no additional cases be assigned to the judge until further order of the Council. The Supreme Court declined to reach the merits of the judge's challenge on the ground that he had failed to seek relief initially from the Council itself.

Whether the District Court correctly deemed appellant's suit to be a proper occasion on which to decide these important matters depends upon what had happened to appellant by the time of the District Court's decision. The record reveals that a complaint had been filed against appellant; the chief judge of the circuit in which the complaint was filed had formed an investigative committee of judges; and the investigation had begun. Precisely how far it had progressed the record does not tell. We do know, however, that the committee had not yet issued a report of its conclusions and recommendations to the Council for any further action deemed proper.

When such a report does eventually issue, it may recommend that the Council invoke one or another of its delineated disciplinary powers. The report, however,

may well urge the Council to transfer the proceedings directly to the Judicial Conference, or, alternatively, to conclude the proceedings against appellant. Even if some disciplinary measure were recommended to the Council, the Council would be free to reject that recommendation and decline to impose any sanction on appellant. Moreover, should the council determine to exercise any of its specified disciplinary powers, that determination would be reviewable upon petition to the Judicial Conference. The Conference would then have before it the same panoply of options available to the Council, including the option of concluding the proceedings. The Conference would also be free to recommend impeachment to the House of Representatives.

We belabor the possible outcomes under the Act only to demonstrate that they are, as yet, only possibilities. Anything might happen in the proceedings initiated against appellant, from early dismissal to a recommendation of impeachment. Of the powers the Act vests in the judicial administrative organs, few, some, or many may be invoked against appellant. Yet appellant asks this court for a declaration that none of the powers vested by the Act can constitutionally be exercised.

It is an established and salutary principle of the law of federal courts that constitutional issues affecting legislation will not be determined "in advance of the necessity of deciding them" or "in broader terms than are required by the precise facts to which the ruling is to be applied." Rescue Army v. Municipal

Court of Los Angeles, 331 U.S. 549, 569 (1947). Even for those cases that are clearly within the limits of federal jurisdiction, the Supreme Court has "developed for its own governance . . . a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision." Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring). As the Court has stated:

> This Court has recognized in the past that even when jurisdiction exists it should not be exercised unless the case "tenders the underlying constitutional issues in clean-cut and concrete form." Rescue Army v. Municipal Court, 331 U.S. 549, 584 (1974). Problems of prematurity and abstractness may well present "insuperable obstacles" to the exercise of the Court's jurisdiction, even though that jurisdiction is technically present. Id. at 574.

Socialist Labor Party v. Gilligan, 406 U.S. 583, 588 (1972).

The principle of constitutional avoidance was well illustrated by a pair of opinions in the same case, the first by this court, Buckley v. Valeo, 519 F.2d 821 (D.C. Cir. 1975), and the second by the Supreme Court, 424 U.S. 1 (1976). Buckley involved a multipronged attack on the Federal Election Campaign Act of 1971. One aspect of the attack was a challenge to the constitutionality of the method of appointment to, and powers to be exercised by, the newly-created Federal Election Commission. This court reached the merits only of the appointment issue and the validity of one of the Commission's powers--the power to issue advisory opinions. The former issue was clearly adjudicable because the Commission had already been appointed. The latter issue

was also adjudicable because an advisory opinion might, under the statute, be issued at any time.

The Court declined, however, to pass on the constitutionality of the statutory conferral upon the Commission of the remaining powers challenged in the lawsuit--namely, the power to disqualify candidates for office, to enact rules, to conduct investigations using, if necessary, the power of subpoena, and to initiate civil actions. The Court stated its underlying reasoning thus:

> In its present stance, this litigation does not present the court with the concrete facts that are necessary to an informed decision. No party has been joined in a civil enforcement action initiated by the Commission; no one has been disqualified from running for office; the Commission has enacted no rules; nor has any party been adversely affected by the exercise of most of the Commission's broad powers under 2 U.S.C. §§ 437d, 437g. In fact, some of the issues presented to us in the certified

> questions may never reach a stage at which they would be ripe for adjudication.

519 F.2d at 893 (citations and footnotes omitted).

In reviewing the decision of the Court of Appeals, the Supreme Court reached the merits of the constitutionality of each of the Commission's statutory powers. The Court's opinion, however, did not call into question the reasoning or judgment of the Court of Appeals. Rather, the Court's discussion implicitly reaffirmed the principle of constitutional avoidance underlying the Appeals Court's decision:

> Since the entry of judgment by the Court of Appeals, the Commission has undertaken to issue rules and regulations under the authority of § 438(a)(10). While many of its other functions remain as yet unexercised, the date of their all but certain exercise is now closer by several months than it was at the time the Court of Appeals rules.

424 U.S. at 115-17. The Court thus made clear that, only because the exercise of the Commission's various powers was imminent and "all but certain," was it justified in deciding the constitutionality of those powers.

In the instant case, as in Buckley, appellant asks this court to pass on the constitutionality of an entire Act of Congress that vests in an entity a host of powers, most of which have not been invoked and many of which may never be invoked in the proceedings concerning appellant. To decide the legitimacy of powers whose exercise is the antithesis of "all but certain" would clearly contravene the principle of constitutional avoidance underlying both this court's and the Supreme Court's decisions in Buckley, the principle that "the quarrel must be with the official and not the statute book."

P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart & Wechsler's Federal Courts and the Federal System 141 (2d ed. 1972).

Concededly, certain informal fact-gathering powers have been exercised by the Committee. Under Buckley, this Court might seem justified in deciding the constitutionality of such powers. To do so, however, would contravene another aspect of avoidance--the policy of rendering judgment on the constitutionality of proceedings while the proceedings themselves are going on. As Chandler found, action by the judicial councils "has few of the characteristics of traditional judicial action and much of what we think of as administrative action." 398 U.S. at 88 n.10. The Councils, in short, are essentially "administrative bodies." Id. at 86 n.7.

As is traditional in judicial review of administrative action, a court should be loath to interfere, by means of injunction, with ongoing proceedings by a particular council. See Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967); 4 K. Davis, Administrative Law Treatise § 26:10, at 460 (2d ed. 1983) ("Only the most exceptional circumstances will justify a judicial interpretation of an ongoing administrative proceeding. . . ."). Like administrative agencies, as well as state courts, see Younger v. Harris, 401 U.S. 37 (1971), the councils and Conference are entitled to a measure of comity sufficient to preclude disruptive injunctive relief by federal courts absent a showing that serious and irremediable injury will otherwise result.

Appellant has not, and indeed cannot, show that such injury is likely to occur if this court does not grant his request for injunctive relief. AS discussed supra pp. 14-15, the proceeding concerning appellant may terminate at any number of points before sanctions have been imposed upon him. Moreover, appellant has available his constitutional challenge to the validity of provisions of the Act in every one of the situations in which he is exposed to the threat of injury. Thus, he may interpose his constitutional arguments, e.g., as a defense to a subpoena, as a ground for review by the Conference of a Council determination, and in a lawsuit such as this one, brought when injury is significantly more immediate and concrete than it is now. See Buckley, 424 U.S. at 116-17.

Appellant does not face the dilemma--frequently a feature of ripeness cases--of whether, on the one hand, to change his actual or intended behavior to comply with a law or regulation and in consequence to forego whatever advantage he might otherwise have gained, or on the other hand, to refuse to comply and risk initiation of a proceeding against him. See 4 K. Davis, supra, § 25:6 at 367-73 (discussing cases). That dilemma exists only when there is simply a threat of proceedings, not an actual, initiated proceeding. Appellant is therefore made no worse off by having to await final disposition of the proceeding.

In sum, we decline appellant's invitation to invalidate the entire Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 merely on the basis of the fraction of that Act that has so

far been invoked. The words of this court's opinion in Buckley are instructive:

> As might be expected in an area as novel and complex as this, which implicates all segments of the federal establishment, the manner of constituting [the Federal Election Commission], the tasks assigned to it, and the authority conferred upon it are in many respects unique. It may eventually prove to be true that some of that authority may be found, when and if exercised in a concrete context, in conflict with the Constitution. But so essential to the effective functioning of the overall legislative scheme is the existence of the new agency contrived to monitor and administer it that a court should be alert to the relationship of the agency to that scheme. The one without the other risks the frustrations and failures of the past. Unless it can clearly find that the agency is wholly without legitimacy in the very terms by which it is brought into being, the court's hand should be stayed.

519 F.2d at 888.

We must permit the proceedings against appellant to unfold as they will. In the course of time we may have a more concrete application of the Act as a whole. Then, and only then, will we be justified in deciding the facial constitutionality of the Act. Accordingly, we vacate the District Court's grant of summary judgment to appellees on Count One.

V

Adjudication of appellant's claim in Count Two that the Act has been unconstitutionally applied to him is also premature. We see no difference relevant to the policy against interference with ongoing proceedings between appellant's challenge to the facial constitutionality of the statute under which this proceeding is being carried out and his challenge to the constitutionality of the statute as

applied in the proceeding. The same requirement of irreparable harm must therefore be met in this case, and, for the reasons stated above, appellant cannot do that. Dismissal of Count Two was therefore proper.

Our pretermission of the merits of Count Two, however, encompasses the issue of whether claims such as those raised by Count Two are precluded from judicial review, as the District Court held. That issue, like all other interpretive and Constitutional issues posed by the Act, must await an appropriate occasion for disposition. Until the applicability of the Act in an individual case is properly before a court, the preclusion vel non of questions of the Act's application is unripe. We therefore affirm only the

District Court's bare ruling of dismissal of Count Two; we do not affirm the Court's reasoning with respect to that count.

VI

We also affirm the dismissal of Count Three--the conspiracy claim--on somewhat different grounds from those enunciated by the District Court. In the litigation over whether the investigative committee would have access to the grand jury materials, see supra p. 8, one of appellant's grounds for objecting to such access was that the petition, and the investigation it initiated, were part of a conspiracy of judges to deprive him of his constitutional rights. Expressly addressing appellant's conspiracy claims, the Eleventh Circuit panel stated:

> Judge Hastings' charge that the Committee's investigation is part of a larger conspiracy is not a proper subject for consideration in this appeal. The investigation is being conducted pursuant to the Act

> and the district court was not the proper forum for addressing any underlying questions of constitutional abuse. Those concerns may be raised by Judge Hastings in a challenge to the actions, if any, taken by the Judicial Council.[10]
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> 10. Under section 372(c)(10) a judge aggrieved by an action of the judicial council of the circuit may petition the Judicial Conference of the United States for review of that action.

In re Petition, supra, 735 F.2d at 1275 & n.10.

In view of this holding, we cannot but conclude that appellant has already had a full and fair opportunity to litigate his claim of conspiracy. The Eleventh Circuit's holding that such a claim is barred by § 372(c)(10) of the Act is binding on Judge Hastings for all future litigation between himself and the committee over matters related to this investigation. Appellant may not reassert

his conspiracy claim in this or any other court. See National Treasury Employers Union v. Internal Revenue Service, No. 84-5548, slip op. at 3 (July 9, 1985) (collecting authorities).

We wish to make clear, however, that our ruling is not intended as an endorsement of the Eleventh Circuit's view of the preclusion issue raised by appellant's conspiracy claim. We herein express no view ourselves on that issue.

VII

As to Count Four, we are satisfied that dismissal was proper, although again for reasons somewhat different from the District Court's. The disclosures by Justice Department officials to the Investigative Committee concerning the criminal proceedings against Judge Hastings were proper as a "routine use" under the Privacy Act, 5 U.S.C. § 552a(a)

(7), (b)(3), (e)(3)(D), and the applicable regulations, see 42 Fed. Reg. 53,288, 53,332. Moreover, even if a claim of a violation of the Privacy Act could be made out, appellant would not be entitled to the declaratory and injunctive relief he seeks, such relief not being among those expressly made available to remedy past disclosures made in violation of the Privacy Act. See 5 U.S.C. § 552(a)(g)(1); see also Clarkson v. IRS, 678 F.2d 1368, 1375 n.11 (11th Cir. 1982); Hanley v. Department of Justice, 623 F.2d 1138, 1139 (6th Cir. 1980); Parks v. INS, 618 F.2d 677, 684 (10th Cir. 1980); Cell Associates, Inc. v. NIH, 579 F.2d 1155, 1160-61 (9th Cir. 1978).[7]

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7. With regard to the due process claims in Count Four, we find them meritless. Even if, as appellant suggests may be the case, the request by the Committee for the information supplied by the government did not satisfy the statutory requirement of a

In sum, we hold that, at the time the District Court rendered its decision, adjudication of Count One was premature, and we therefore vacate the District Court's grant of summary judgment to appellees on Count One. For the same reason, we hold that dismissal of Count Two was proper, although we do not affirm the ruling of the District Court that judicial review of Count Two is barred by the Act. Finally, we affirm the dismissal of Count Three on grounds of collateral estoppel and affirm the dismissal of Count Four as proper under the terms of the Privacy Act. We remand this case to the District Court for entry of an order of dismissal without prejudice.

It is so ordered.

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7. (Continued)
writing, that technicality would hardly rise to the level of a violation of due process rights.

Edwards, Circuit Judge, concurring:

PROLOGUE

At the birth of our nation, Alexander Hamilton charted one of the fundamental precepts upon which our system of government is founded:

> [The] independence of the judges is. . . requisite to guard the constitution and the rights of individuals [against legislative encroachments and] from the effects of those ill humours which the acts of designing men, or the influence of particular conjunctures, sometimes disseminate among people.[1]

For the nearly 200 years that have passed since Hamilton wrote these words, we have endeavored to preserve an independent judiciary as a "citadel of the public justice and the public security."[2] Our

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1. THE FEDERALIST No. 78, at 527 (A. Hamilton) (J. Cooke ed. 1961).

2. Id. at 524.

Founding Fathers were clear in their determination to reject the English tradition which had fostered legislative interference with the regular courts of justice.[3] And, regardless of differences in legal philosophy, proponents of judicial activitism and judicial restraint alike have long agreed that, in order to fulfill its designated constitutional role, the judiciary must be independent in all ways that might affect substantive decisionmaking.

In light of our long tradition of an independent judiciary that has been largely free from legislative tampering, it is ironic that, in 1985, a member of the federal judiciary is being tried under an act of Congress that purports to define

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3. P. HOFFER & N. HULL, IMPEACHMENT IN AMERICA, 1635-1805 xi (1984).

judicial misconduct and to authorize sanctions--short of actual removal--against offending judges. What is even more curious to me is the apparently unquestioning acceptance by the judiciary of an act that may, in part, be significantly at odds with our basic constitutional structure and previously inviolate principles of separation of powers.

My concern with Judge Hastings' case has less to do with issues of individual misconduct than with a potentially unconstitutional legislative incursion into the judicial province. In our haste to assail Judge Hastings outside of the constitutionally prescribed impeachment process, we seemingly have lost sight of Hamilton's words. In our zeal for efficiency and moral purity in the judicial ranks, we may be indulging a cavalier assumption that the independence of the

judiciary will not suffer significantly from "minor" legislative encroachments. Our self-righteous finger-pointing at Judge Hastings may blind us to the reality that his case has more to do with the potential diminution of the independence of the judiciary than with the alleged misconduct of an individual judge. If Judge Hastings can be made to answer, outside of the criminal and impeachment processes, for judicially-related activities, pursuant to a loosely constructed congressional act regulating judicial "misconduct," one wonders about the sanctity of separation of powers and the inviolability of judicial independence. After this case has become ripe and is finally adjudicated, I hope that these issues will not be lost amidst cavalier assumptions or ignored because of our hesitation to deal with delicate and

difficult questions of constitutional law.

I.

As to the first two counts of Judge Hastings' complaint, I concur in Judge McGowan's able opinion holding that the case currently is not ripe to consider the constitutionality of the disciplinary provisions of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980. 28 U.S.C. § 372(C)(1982) (the "Judicial Conduct and Disability Act of 1980" or the "Act"). I concur in the judgment as to the third and fourth counts. I write separately, however, to reflect on some grave concerns that I have with certain issues raised by this case.

II.

The misconduct with which Judge Hastings is charged--inter alia conspiracy to solicit bribes, allowing improper ex parte contacts between his staff and counsel, and total abdication of his decisionmaking authority--is precisely the sort of behavior that all would agree undermines the integrity of the judiciary and the judicial process. The Act authorizes the judicial councils for the federal circuits and the Judicial Conference of the United States to investigate such allegations of misconduct and, if a council or the Conference finds the allegations to be supported, to take disciplinary action, short of actual removal from office, against the offending judge. I worry that, in our ardor to ensure that behavior such as that of which Judge Hastings is accused not taint our

judicial system, we may be tempted to slight the serious constitutional questions that the Act poses. Fifteen years ago the late Senator Sam J. Ervin, Jr., then chairman of the Senate Judiciary Subcommittee on Separation of Powers, cautioned in connection with the contemporary clamor for judicial reform that "some deeply concerned persons would emulate the example of Sampson, who, in his blind zeal, destroyed the pillars on which the temple rested."[4] We must heed that warning today.

The constitutional questions raised by Judge Hastings are important and difficult. The case is not, as the

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4. Ervin, Separation of Powers: Judicial Independence, 35 LAW & CONTEMP. PROBS. 108, 122 (1970).

appellees seem to suggest, about whether the Act's interference with "the unfettered freedom of judges to engage in 'conduct prejudicial to the effective and expeditious administration of the business of the courts'" violates Article III. Brief for Defendants/Appellees the Judicial Conference of the United States, et al. at 37-38 (quoting 28 U.S.C. § 372(c)(1)). Rather, it is about the fundamental meaning of the guarantee of an independent judiciary under Article III. Does this guarantee mandate simply a judiciary that is largely free from control by coordinate branches or does it also compel that, appellate review and mandamus excepted, judges be independent of one another?

The Framers believed that an independent judiciary was crucial to a free republic. It is clear that to them the term "independent judiciary" meant at

least that the judiciary be essentially separate from the other "great departments of power."[5] Quoting Montesquieu's Spirit of the Laws, Alexander Hamilton declared in The Federalist No. 78 that "'there is no liberty, if the power of judging be not separated from the legislative and executive powers.'"[6] These same views were echoed by James Madison at the Constitutional Convention:

> Judges should not hold their places by. . . [uncertain] tenure. . .[b]ecause they might be tempted to cultivate the Legislature, by undue complaisance, and thus render the Legislature the virtual expositer, as well as the maker of the laws.[7]

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5. THE FEDERALIST No. 47, at 324 (J. Madison).

6. THE FEDERALIST No. 78, at 523.

7. 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 34 (rev. ed. 1966).

To insulate the judiciary from pressure from the other branches, the authors of the Constitution granted federal judges life tenure, subject to a good behavior requirement, and freedom from potentially coercive reductions in their salaries. U.S. Const. art. III, § 1. The Constitution has long been understood to establish impeachment as the only method available to the coordinate branches for the actual removal of judges from offices. U.S. Const. art. I, §2, cl. 5 and § 3, cl. 6; art. II, § 4. As Hamilton explained, "[t]his is the only provision on the point, which is consistent with the necessary independence of the judicial character."[8] History thus teaches us that the Framers "hoped to make the judges free from popular pressure and

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8. THE FEDERALIST no. 79, at 533.

from legislative control. Their purpose was to create a truly independent judiciary limited only by the cumbersome process of impeachment."[9]

The relevance of Article III's guarantee of an independent judiciary and of the Impeachment Clause to the authority of the judiciary to remove (or discipline) its own members for misconduct is somewhat less certain and has been vigorously debated by lawyers, scholars, and jurists for the last half century.[10]

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9. Ziskind, Judicial Tenure in the American Constitution: English and American Precedents, 1969 SUP. CT. REV. 135, 153.

10. Compare Kurland, The Constitution and The Tenure of the Federal Judges: Some Notes from History, 36 CHI. L. REV. 665 (1969) (contending that impeachment is the only constitutional means of removal); Ziskind, supra note 9 (same); Fishburn, Constitutional Judicial Tenure Legislation? The Words May be New, But the Song Sounds the Same, 8 HASTINGS CONST. L.Q. 843, 865-67 (1981) (same); Chandler v. Judicial Council, 398 U.S. 74, 129-43 (1970) (Justices Douglas and Black dissenting from the denial of Judge

The answer to this question seems to require the resolution of at least two preliminary issues. First, is the constitutional guarantee of an independent judiciary, which is implicit in the promises of life tenure and salary protection under Article III, intended to secure the independence of individual judges as well as of the judiciary as an entity? Second, if the guarantee is meant

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10. (Continued)
Chandler's petition for a writ of mandamus or prohibition, arguing that the Constitution does not permit the judiciary to discipline its ranks); Ervin, supra note 4 (arguing that the judiciary may not constitutionally discipline its members); and Kaufman, The Essence of Judicial Independence, 80 COLUM. L. REV. 671 (1980) (same, in particular criticizing the Judicial Conduct and Disability Act of 1980), with R. BERGER, IMPEACHMENT 122-80 (1973) (arguing that the judiciary may constitutionally remove judges from office, using Article III's good behavior standard as a measure) and Shartel, Federal Judges-Appointment, Supervision, and Removal--Some Possibilities under the Constitution, 28 MICH. L.REV.870 (1930) (same).

to preserve the independence of individual judges, can such independence be maintained without protection against pressure from peers?

I firmly believe that the guarantee of independence runs to individual judges as well as to the judicial branch. Article III's explicit assurances of life tenure and undiminished salaries pertain directly to individual judges. Moreover, how could the underlying purpose of these assurances--to foster independent decisionmaking--be achieved other than by protecting the independence of individual decisionmakers? Even when judges sit in panels, our confidence in their collective decisionmaking is predicated on the assumption that each judge will make an independent and reasoned evaluation of the issues. If independent decisionmaking is

to be protected, then, individual judges must be shielded from coercion.

I am also inclined to believe that in order for Article III's guarantee of independence to be fulfilled, the Constitution must be interpreted to designate impeachment as the exclusive mechanism for disciplining or removing federal judges. First, the authors of the Constitution expressly designated impeachment as the means by which federal judges may be removed from office. In view of the Framers' concern for the independence of judicial decisionmaking and the absence of any express constitutional authority on the subject, I can find no warrant for inferring a power in the judiciary to discipline its members or remove judges for misconduct. It seems obvious that judicial independence may "just as easily

be eroded by powerful hierarchies within the judiciary itself as by outside pressures from the legislative and executive branches of the government."[11] My concern here is not for the corrupt judge who is annoyed by his or her colleagues' demonstrations of disapproval. My worry is that the provisions of the Act might be subject to abuse--that they might be misused to pressure or intimidate the non-conformist, the judge whose judicial style or legal philosophy are repugnant to the majority of his or her colleagues. As Justice Douglas aptly observed in his dissent in Chandler v. Judicial Council,

> [t]he power to keep a particular judge, from sitting on a racial case, a church-and-state case, a free-press case, a search-and-seizure case, a railroad case, an antitrust case, or a union case may have profound consequences. Judges are not fungible; they cover the constitutional spectrum; and a

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11. Ervin, supra note 4, at 125.

> particular judge's emphasis may make a world of difference when it comes to rulings on evidence, the temper of the courtroom, the tolerance for a proferred defense, and the like. Lawyers recognize this when they talk about "shopping" for a judge; Senators recognize this when they are asked to give their "advice and consent" to judicial appointments; laymen recognize this when they appraise the quality and image of the judiciary in their own community.
>
> These are subtle, imponderable factors which other judges should not be allowed to manipulate to further their own concept of the public good.

398 U.S. 74, 137 (1970).

We cannot fall prey to a natural desire to trust in our own wisdom, good will, and abhorrence of abuse of power. We must "[keep] in mind that tools created by the well-intentioned for beneficient uses may fall into less worthy hands to be used for less appropriate ends."[12]

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12. Kurland, supra note 10, at 666.

III.

In considering specific provisions of the Act, I find significant separation of powers and Impeachment Clause issues arising from the legislative attempt to authorize the judiciary to invoke disciplinary suspensions against individual members found guilty of "misconduct." Likewise, I believe that there may be serious due process questions implicated by the statutory preclusion of judicial review of actions taken against individual judges by the judicial councils and the Judicial Conference of the United States. Finally, I find very troublesome the question whether the Compensation Clause requires the Government to pay the legal fees of a judge who is the subject of a complaint under the Act.

A.

Sections 372(c)(6)(B)(iv) and 372(c)(8) of the Act permit judicial councils and the Judicial Conference to order that, "on a temporary basis for a time certain, no further cases be assigned to any judge or magistrate whose conduct is the subject of a complaint." At oral argument, the court attempted to ascertain whether the suspension provision contained any implicit time limits. When asked whether a judicial council could "temporarily" suspend a judge for fifteen years, counsel for the appellees unhesitatingly responded, "yes." It seems to me that this suspension provision, both on its face and as interpreted by the appellees, poses extraordinarily troublesome separation of powers and Impeachment Clause problems.

Initially, the suspension provision may be an unconstitutional intrusion by Congress into the province of the judiciary. It is true that the Necessary and Proper Clause, U.S. Const. art. I, § 8, cl. 18, enables Congress to provide, to some extent, for the efficient operation of the federal courts. While it is unquestioned that Congress has the power to establish (or authorize the judiciary to establish) purely administrative, "housekeeping" procedures--such as procedures for managing dockets and assigning cases--that authority does not necessarily extend beyond such administrative matters. The power of Congress to create procedures for the judiciary is constrained by the separation of powers doctrine and Article III's guarantee of an independent judiciary. I recognize that the reach of legitimate congressional

authority is not easily reduced to precise definition, yet surely it must terminate at the point where it affects in any significant way the quintessentially judicial function of substantive decisionmaking. By authorizing suspension--the total removal of a particular judge's cases--Congress arguably has interfered in the most basic way with a judge's decisionmaking authority. Furthermore, the fact that the appellees contend that Congress may sanction a fifteen-year suspension under the Necessary and Proper Clause suggests that they see no real limits on congressional power to meddle in the affairs of the judiciary--other than removal undisguised by another name. I find this expansive reading of congressional authority over the judiciary alarming and worry that if we indulge this particular incursion we will encourage

even more intrusive ones.

The separation of powers problem that arises when Congress prescribes for the judiciary more than merely administrative matters is not cured by the contention that the judiciary possesses inherent powers of self-regulation that are co-extensive with those delegated by the Act and that therefore Congress, by doing for the judiciary what it could have done for itself, has not intruded in any meaningful way into the domain of the courts. As I noted previously, I am inclined to believe that even the judiciary's inherent powers of self-regulation do not extend beyond purely administrative details. But even assuming that we do have the constitutional power to regulate and discipline our own ranks, it in no way follows that Congress should rely on that power to legislate our procedures for us under the

Necessary and Proper Clause. Out of deference to a coordinate branch, we have been reticent to intervene in Congressional affairs that are subject to internal resolution. See, e.g., Moore v. United States House of Representatives, 733 F.2d 946, 954-56 (D.C. Cir. 1984), cert. denied, 105 S. Ct. 779 (1985); Vander Jagt v. O'Neill, 699 F.2d 1166, 1172-77 (D.C. Cir.) cert. denied, 104 S. Ct. 91 (1983); Riegle v. Federal Open Market Committee, 656 F.2d 873, 881-82 (D.C. Cir.), cert. denied, 454 U.S. 1082 (1981). Reciprocal respect for the courts suggests that Congress should, and arguably must, be equally reluctant to impose its preferences on the judiciary's governance of its internal affairs.

If counsel for the appellees was correct in asserting that the suspension provision permits suspension of a judge

for significant periods of time, I believe that the Act may also unlawfully delegate congressional responsibility under the Impeachment Clause to the judiciary. Suspension for a fifteen year period strikes me as being the functional equivalent of removal. Should effective removal be available through council and Conference proceedings, Congress would retain little incentive to put itself through the cumbersome, time-consuming and painful process of impeachment, which I believe the Framers intended to be the exclusive method of removing federal judges from office. This facile circumvention of the Constitution should not be countenanced.

B.

The provision of the Act precluding judicial review of council and Conference orders and determinations also poses difficult issues, with regard to both the

scope of preclusion and the effect preclusion might have on the constitutionality of the Act's vesting of investigative and adjudicative authority in the councils and Conference.

Section 372(c)(10) provides:

> A complainant, judge, or magistrate aggrieved by a final order of the chief judge under paragraph (3) of this subsection [orders dismissing the complaint or concluding the proceedings] may petition the judicial council for review thereof. A complainant, judge, or magistrate aggrieved by an action of the judicial council under paragraph (6) of this subsection [authorizing further investigation and sanctions] may petition the Judicial Conference of the United States for review thereof. The Judicial Conference, or the standing committee. . . ., may grant a petition filed by a complainant, judge, or magistrate under this paragraph. Except as expressly provided in this paragraph, all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise.

(Emphasis added). It is difficult to determine from the text of this provision whether Congress intended to preclude judicial review only of substantive decisions of the councils and Conference or whether it intended, in addition, to preclude review of challenges to the legality of council and Conference decisionmaking processes, such as Judge Hastings' allegation that his right to due process had been infringed upon by the inclusion on the Eleventh Circuit Council's Investigating Committee of judges who were biased against him and who had conspired to drive him from office. The Supreme Court has often noted that "'only upon a showing of "clear and convincing" evidence of contrary legislative intent should the courts restrict access to judicial review.'" Lindahl v. Office of Personnel Management, 105 S. Ct. 1620,

1627 (1985) (quoting Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967)). Resolution of the scope of section 372(c)(10)'s preclusion of judicial review will require careful consideration not only of the provision's "'express language, but also [of] the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved.'" Id. (quoting Block v. Community Nutrition Inst., 104 S. Ct. 2450, 2454 (1984)). We should be especially cautious in determining that Congress wished to preclude review where such a conclusion would mean, as here, that all judicial review of a constitutional claim would be barred.[13]

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13. The possibility of discretionary review by the councils and the Conference does not alleviate my concerns regarding the preclusion of judicial review of claims of due process violations. First, a council or the Conference may refuse to hear such a claim. Second, if the claim

If, however, section 372(c)(10) is interpreted to bar all judicial review of claims of illegality in the decisionmaking process, including claims of actual bias, the constitutionality of the Act's combination of investigative and adjudicative powers in the same bodies would be called into serious question. It is true, as the appellees note, that in Withrow v. Larkin the Supreme Court held that the mere combination of investigative and adjudicative functions in administrative adjudications does not automatically create a presumption of bias. 421 U.S. 35, 47 (1975). The Withrow Court, however, assumed that judicial claims of

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13. (Continued)
is that the Conference has violated a judge's right to due process, the Act offers no provision for review.

actual bias was available. Id. at 54-55 & n. 21. Withrow, therefore, would not be dispositive of the constitutionality of the Act, should the Act be held to preclude judicial review of claims of actual bias. Under those circumstances due process might require a separation of functions.

C.

Finally, I am seriously troubled by Judge Hastings' argument that if the Act is interpreted not to provide for Government subsidization of the legal expenses of a judge accused of wrongdoing under the Act, it may violate the Compensation Clause. The purpose of that clause, which states that judges "shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office," U.S. Const., art. III, § 1, is to

strengthen the independence of the judiciary against Congress. As the Framers understood, "a power over a man's subsistence amounts to a power over his will."[14] But if his remuneration be secure, "[a] man may then be sure of the ground upon which he stands, and can never be deterred from his duty by the apprehension of being placed in a less eligible situation."[15]

The standard that federal courts have applied to determine whether an indirect reduction in income, such as that alleged by Judge Hastings, violates the Compensation Clause is that

> "[i]ndirect, nondiscriminatory diminishments of judicial compensation, those which do not amount to an assault upon the independence of the third branch or any of its members, fall outside the protection of the Compensation Clause."

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14. THE FEDERALIST No. 79, at 531 (A. Hamilton) (emphasis in original).

15. Id. at 532.

Duplantier v. United States, 606 F.2d 654, 669 (5th Cir.), reh'g denied, 608 F.2d 1373 (1979), cert. denied, 449 U.S. 1076 (1981) (quoting Atkins v. United States, 556 F.2d 1028, 1045 (Ct. Cl. 1977), cert. denied, 434 U.S. 1009 (1978).

Utilizing this standard, the court in Duplantier upheld the penalty provisions of the Ethics in Government Act that pertain to federal judges. 28 U.S.C. App. § 304(a). The court observed that in that case there was "no 'plan fashioned by the political branches. . .ineluctably operating to punish the judges qua judges,'" and emphasized that Congress had imposed precisely the same penalty for failure to file financial reports on members of Congress and on members of the executive branch. 606 F.2d at 669 (quoting Atkins, 556 F.2d at 1054). Similarly, in Atkins, the Court of Claims held that a seven-year

"freeze" on judicial pay during a period of inflation did not offend the Compensation Clause. The court explicitly noted that judges were not the only targets of the freeze; certain other government employees had been included. The court reasoned that

> [i]f Congress intended to mount an attack on the independence of the judiciary by means of a salary freeze in the face of high inflation, why would it have included in the freeze the top level civil servants and even, to a lesser extent, its own Members?. . . Reasons other than a desire to punish the judges or drive them from office appear to lie behind the 7-year omission of a pay raise.

556 F.2d at 1055-56 (footnote omitted).

By contrast to the congressional action (or inaction) at issue in Duplantier and Atkins, the Judicial Conduct and Disability Act of 1980 is directed at judges qua judges. If the Act were interpreted to preclude Government sub-

sidization of defendant judges' legal expenses, the salaries of individual judges, who are singled out by the complaint process, would be reduced by legal fees. Because the cost of defending against a complaint can be substantial,[16] this reduction may be significant. In considering the Compensation Clause issue, we must again remember that our constitutional concerns lie not with the unsympathetic plight of the corrupt judge who must pay for his or her misdeeds, but with the possibility that the threat of exorbitant defense expenses might chill the independent decisionmaking of a nonconformist judge.

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16. One federal judge reportedly spent $70,000 defending himself against a complaint that ultimately was dismissed. See Note, Unnecessary and Improper: The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 94 Yale L.J. 1117, 1142 (1985).

IV.

Although I have no reason to doubt the integrity of members of the federal judiciary, I am willing to assume that there may be a few corrupt judges, who dishonor their title and role in our society. This does not change my view, however, that the Constitution specifies only one procedure for disciplining them--impeachment. The fact that, in practice, impeachment may be so difficult that unworthy judges are not often removed from office does not give either Congress or the judiciary license to fashion an alternative, more efficient method of dealing with the problem. "Convenience and efficiency are not the primary objectives--or the hallmarks--of democratic government." Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 944 (1983). Chadha concerned the constitu-

tionality of the legislative veto; however, many of the Court's observations about the Framers' conscious choice to eschew a certain modicum of efficiency in government in order to preserve higher values are pertinent in this case. In my view, the Framers' choice here was to limit the accountability of individual judges for misconduct to impeachment in order to maximize judicial independence.

To paraphrase the Court in Chadha, the choice that I "discern as having been made in the Constitutional Convention [may] impose burdens on [judicial accountability] that . . . seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary [interference with judicial independence] to go unchecked. There is no support in the Constitution

. . . for the proposition that the cumbersomeness and delays often encountered in complying with explicit Constitutional standards [i.e., impeachment] be avoided, either by the Congress or by the [judiciary]." Id. at 959.

An independent judiciary is, as the Framers understood, a principal guarantor of our liberty. We must temper our eagerness to see that only honorable and dedicated women and men fill the judicial ranks with an awareness of the danger to the judiciary of impairing independence and inhibiting diversity of style and opinion among jurists. Should we fail to do so, we may find that "the hope for an independent judiciary will prove to have been no more than an evanescent dream." Chandler, 398 U.S. at 143 (Black, J., dissenting).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

The Honorable ALCEE L. HASTINGS,	)	
Plaintiff,	)	
v.	)	Civil Action No. 83-3850
JUDICIAL CONFERENCE OF THE UNITED STATES, ET AL.,	)	
Defendant.	)	

MEMORANDUM

United States District Judge Alcee L. Hastings brought this action seeking to enjoin an ongoing investigation of his judicial conduct by an investigative committee of the Judicial Council of the Eleventh Circuit. The investigation was begun pursuant to the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2035 (1980), 28 U.S.C. §§ 331, 332, 372(c), 604. Judge Hastings seeks a declaration that the Act is unconstitu-

tional on its face and as applied to him. These issues are before this Court on cross-motions for partial summary judgment, which have been fully briefed and argued,[1] along with the defendants' motion to dismiss certain counts on grounds of ripeness and subject-matter jurisdiction.

Judge Hastings filed this action on December 23, 1983. The amended complaint names as defendants the Judicial Conference of the United States, the governing body of the federal court system on which all circuits are represented by a circuit judge and a district judge; the Chief Justice of the United States in his official capacity as presiding officer of the Conference; the Standing Committee of

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1. The Washington Legal Foundation has filed a brief amicus supporting defendants.

the Judicial Conference;[2] the Judicial Council of the Eleventh Circuit, the governing body of judges for that circuit; the Chief Judge of the Eleventh Circuit, John C. Godbold; the members of the Investigating Committee, Judges Godbold, Tjoflat, Johnson, Pointer and O'Kelley;[3] and, in Count Four, the Attorney General of the United States, William French Smith, who is joined with other defendants

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2. The Conference has named a Standing Committee as authorized by the Act to exercise the power of the Conference over judicial conduct matters. See 28 U.S.C. §§ 331, 372(c)(10), (12), (14), (15). This committee is known as the Committee to Review Circuit Council Conduct and Disability Orders. It is referred to herein as the Standing Committee.

3. Judges in the Eleventh Circuit named defendants and that Circuit's Judicial Council have waived objections to venue. Other preliminary issues going to the Court's jurisdiction are discussed later.

in a Privacy Act claim.[4]

While the complaint states a multitude of prolix and sometimes inconsistent constitutional claims, Judge Hastings' basic contentions are: (1) that the Act interferes with the constitutional guar- guarantee of an independent judiciary by providing machinery for disciplining judges and delegating impeachment powers to the judiciary, in violation of the separation of powers doctrine, and (2) that the Act, both on its face and as

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4. The amended complaint contains four counts. Count One claims that the Act on its face violates the separation of powers doctrine and the due process rights of judges under inquiry. Count Two, while incorporating the Count One claims, focuses on the application of the Act to Judge Hastings, alleging that the investigation of him has already violated his due process rights and will violate his rights in the future. Count Three alleges a conspiracy among Judges of the Eleventh Circuit to violate plaintiff's constitutional rights, and Count Four is the Privacy Act count.

applied to him, violates due process rights.

I. The Act

The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 culminated nearly 50 years of consideration by Congress and the federal judiciary of the best means to assure responsible judicial conduct consistent with the constitutionally protected independence of the judicial branch.

At the urging of Chief Justice Hughes and other distinguished federal judges, Congress in 1939 created judicial councils for each circuit empowering them to "make all necessary orders for the effective and expeditious administration of the business of the courts" in each circuit. Administrative Office Act of 1939, Pub. L. No. 76-299, 53 Stat. 1223, 28 U.S.C. § 332. Under this authority the judicial branch

has proceeded to run its affairs by negotiation, rules and persuasion. In 1970, the Supreme Court in Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74 (1970), noted that it was "reasonable, proper, and necessary" for the federal courts to have rules governing the management of court business and that "the need for enforcement [of such rules] cannot reasonably be doubted." Id. at 85. But the Court expressed concern about the lack of specificity in the 1939 Act's definition of the scope of the judicial councils' powers and called for legislation to clarify the enforcement power of the councils against recalcitrant judges and the method of review of their orders. Id. at 85 n.6.

The 1980 Act evolved from this background after long and careful legislative deliberation. Congress was acutely aware

of the need both to preserve fundamental judicial independence and at the same time to enable the judiciary "to put its own house in order" by providing tools to implement the judiciary's own disciplinary procedures where necessary to assure judicial accountability. Both House and Senate leaders agreed that

> The goals of the ... legislation are to improve judicial accountability and ethics, to promote respect for the principle that the appearance of justice is an integral element of this country's justice system, and, at the same time, to maintain the independence and autonomy of the judicial branch of government.

H.R. Rep. 1313, 96th Cong., 2d Sess. 1 (1980); 126 Cong. Rec. S13,858 (daily ed. Sept. 30, 1980)(remarks of Sen. DeConcini).

As will be seen from the analysis of the Act that follows, the judicial councils were authorized to hold investi-

gative hearings aided by subpoena power and impose specific sanctions short of removal from office. Procedures for receiving and processing complaints from the public were also enacted to promote public confidence in the federal judiciary.

This formal investigative machinery was expected to be rarely used. Congress emphasized, as did many judges and others supporting the legislation, that informal resolutions by negotiation, discussion and debate among judges were to be preferred and should continue to be used as under the 1939 Act. S. Rep. No. 362, 96th Cong., 1st Sess. 3-4 (1979), reprinted in 1980 U.S. Code Cong. & Ad. News 4315, 4317. However, it was equally clear that on occasion informal resolution would

prove ineffective due to the nature of the issue presented, factual disputes or stubborn intransigence.

The Act provides that any person alleging that a judge "has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or alleging that such a judge . . . is unable to discharge all the duties of office by reason of mental or physical disability," may file a written complaint with the clerk of the court of appeals for that circuit, 28 U.S.C. § 372(c)(1), which the clerk is required to send to the judge involved and to the Chief Judge of the circuit.

If the Chief Judge does not dismiss

the complaint[5] or conclude the proceeding on grounds that corrective action has been taken, 28 U.S.C. § 372(c)(3)(B), he must appoint a special committee, as was done in this case, consisting of himself and equal numbers of district and circuit judges of the circuit, to investigate the complaint. 28 U.S.C. § 372(c)(4)(A).

The judge under inquiry has a right to "adequate prior notice of any investigation." 28 U.S.C. § 372(c)(11)(A). He or she also is entitled to "an opportunity to appear (in person or by counsel) at proceedings conducted by the investigating

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5. The statute provides for dismissal by the chief judge if he finds a complaint "frivolous," "directly related to the merits of a decision or procedural ruling," or not in conformity with the Act's complaint-filing requirement. 28 U.S.C. § 372(c)(3)(A). As of June 30, 1983, 237 complaints had been filed since the Act took effect. Six of those proceeded to the investigative stage.

panel, to present oral and documentary evidence, to compel the attendance of witnesses or the production of documents, to cross-examine witnesses, and to present argument orally or in writing.[6] 28 U.S.C. § 372(c)(11)(B).

The investigating committee is charged with conducting an "investigation as extensive as it considers necessary," and to expeditiously file a written report with the circuit's judicial council stating the committee's findings and recommended action. 28 U.S.C. § 372(c)(5). The

6. The Act specifies these rules as the minimum due process safeguards to be contained in rules established by each judicial council and the Conference for the conduct of proceedings. Councils are free to provide greater protections, and some have done so. See generally Burbank, Procedural Rulemaking Under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 131 U.Pa. L. Rev. 283 (1982). The Eleventh Circuit rules generally track the Act's provisions. See id.

committee, like the judge, has "full subpoena powers." 28 U.S.C. § 372(c)(9)(A).

The judicial council then "shall take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit." 28 U.S.C. § 372(c)(6)(B). Such action may include, but is not limited to, censuring or reprimanding the judge publicly or privately, temporarily "for a time certain" ordering that no new cases be assigned to the judge, requesting that the judge voluntarily retire at full salary, or certifying the disability of the judge.[7] 28 U.S.C. § 372(c)(6)(B). However, the council cannot remove from office any judge appointed to hold office

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7. See 28 U.S.C. § 372(b) for the procedures following a certification of disability.

during good behavior. 28 U.S.C. § 372(c)(6)(B)(vii)(I).

Written notice of any action taken must be sent immediately to the judge under inquiry and to the complainant, and also is to be available to the public in the clerk's office of that circuit's court of appeals.[8] 28 U.S.C. § 372(c)(6)(C), (15). The judicial council may conduct any further investigation it believes necessary before action on the investigating committee's recommendation, and subpoena power is provided, 28 U.S.C. § 372(c)(6)(A).

The council has discretion to refer any complaint and record of related

8. Actions taken by the Judicial Conference or its standing committee also are to be made available to the public in the clerk's office of the appropriate circuit. All such orders are to be accompanied by written reasons "[u]nless contrary to the interests of Justice." 28 U.S.C. § 372(c)(15).

proceedings to the Judicial Conference of the United States. 28 U.S.C. § 372(c)(7)(A). In addition, if the council determines that the judge has engaged in impeachable conduct or conduct which "in the interest of justice, is not amenable to resolution by the judicial council," the council must certify such a finding, together with any complaint and a record of any associated proceedings, to the Judicial Conference. 28 U.S.C. § 372(c)(7)(A),(B).[9]

The Judicial Conference may affirm or reject the Council's action.[10] It may

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9. The council must notify the complainant and the judge of such action "unless contrary to the interests of justice." 28 U.S.C. § 372(c)(7)(C).

10. The Conference may delegate its powers under 28 U.S.C. § 372(c) to a Standing Committee. 28 U.S.C. § 331. The Conference has done so. See n.2 supra.

conduct further investigation of any matters referred to it by the judicial councils and has the same range of disciplinary actions open to it as to the councils. In addition, if it determines that Congress should consider impeachment, it shall send that finding to the House of Representatives along with any record of proceedings for whatever independent action the House considers appropriate. 28 U.S.C. § 372(c)(8).

The Judge under inquiry may ask the Judicial Conference, or a Standing Committee of the Conference appointed under the Act, to review the action taken by the Judicial Council. No other judicial review of council or conference action is allowed. 28 U.S.C. § 372(c) (10).

II. The Investigation

This formal statutory mechanism was invoked in March, 1983, against Judge Hastings, one of 12 active United States District Judges for the Southern District of Florida, following his trial and acquittal on criminal charges of bribery and obstruction of justice.

Judge Hastings was appointed in 1979. He was indicted on December 29, 1981, charged along with William Borders, then a Washington, D.C. attorney, with conspiring "corruptly to ask, solicit, seek, accept, receive and agree to receive, directly or indirectly, a sum of money for themselves in return for defendant Alcee L. Hastings being influenced in his performance of official acts as a United States District Judge." The indictment also alleged that Judge Hastings and Borders "obstruct[ed] and impede[d] the due administration of

Justice," in that Judge Hastings "disclose[d] to ... Borders ... the substance of a judicial order ... that had not yet been issued," gave "advance notice as to when a judicial order ... would be issued," and that Borders revealed that information to a person he believed to be a defendant in that case.

Judge Hastings moved to quash the indictment, contending that Congress alone can punish a federal judge for high crimes and misdemeanors through the impeachment process, and that the executive may not prosecute a sitting federal judge for his official acts. The motion was denied, and the denial was affirmed on appeal. United States v. Hastings, 681 F.2d 706 (11th Cir. 1982), cert. denied, 103 S.Ct. 1188 (1983). The two defendants then had separate trials.

Borders was tried first, in Atlanta. He was convicted of the bribery and obstruction counts as well as two other charges filed against him alone. Borders did not testify. The sufficiency of evidence for the conspiracy conviction of Borders was upheld on appeal in an opinion that recited in detail the evidence against Hastings. See United States v. Borders, 693 F.2d 1318 (11th Cir. 1982), cert. denied, 103 S. Ct. 1875 (1983). Confromted with the fact that Judge Hastings was the only alleged co-conspirator, the Court determined in affirming the jury's conviction of Borders on the conspiracy count that the jury must have on all the evidence properly concluded that Judge Hastings had conspired with Borders.

Judge Hastings was then tried in Miami and was acquitted on Feb. 4, 1983, because of the government's failure to meet the reasonable doubt standard.

On March 17, 1983, two judges[11] filed with the Eleventh Circuit a verified complaint invoking the Act against Judge Hastings. The complaint alleged that Judge Hastings had engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts and had violated several Canons of the Code of Judicial Conduct for United States Judges, adopted by the Judicial Conference of the United States. It

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11. The complainants were Chief Judge William Terrell Hodges, of the U.S. District Court for the Middle District of Florida, and Chief Judge Anthony A. Alaimo, of the U.S. District Court for the Southern District of Georgia. Both are members of the Eleventh Circuit Judicial Council.

focused on Judge Hastings' alleged conduct that gave rise to the indictment and on other conduct revealed and statements made by Judge Hastings in the course of the criminal proceedings.

Specifically, the complaining judges alleged that, in violation of the Code of Judicial Conduct: (1) Judge Hastings had conspired with Borders to obtain a bribe in return for an official judicial act; (2) Judge Hastings made "public and unfounded statements" that the United States was prosecuting him on racial/ political grounds; (3) Judge Hastings knowingly and publicly exploited his judicial position or acquiesced in such exploitation by others acting on his behalf by accepting financial donations from lawyers and other members of the public to defray the costs of his criminal defense; (4) Judge Hastings, by his own

testimony, had allowed ex parte contacts between his law clerk and counsel in pending cases concerning substantive issues in those cases and concerning the content of orders and opinions not yet entered, and had "completely abdicated and delegated" his judicial decision-making authority to his law clerk; (5) Judge Hastings, by his own testimony, had told counsel in a judicial proceeding that he had read an important precedent when he knew he had not and explained his deception by implying that it was common for judges to make such deliberate misstatements; (6) Judge Hastings, by his own testimony, had exploited his judicial position by soliciting funds for someone he knew was a convicted federal offender.

On March 29, 1983, in response to the complaint, John C. Godbold, Chief Judge of the Eleventh Circuit, appointed to an

investigating committee himself, United States Circuit Judges Gerald Bard Tjoflat and Frank M. Johnson, and United States District Judges Sam C. Pointer and William C. O'Kelley. The committee named John Doar, Esquire, a private attorney, as its counsel. On April 15, 1983, a news release was issued through the clerk's office of the Court of Appeals for the Eleventh Circuit, at the direction of Judge Godbold, announcing the filing of the complaint and the appointment of the investigating committee and Mr. Doar.

Judge Godbold refused Judge Hastings' request that all documents and proceedings be opened to the public. Judge Hastings also asked the United States to pay the costs of his defense. On May 6, 1983, the Director of the Administrative Office of the United States Courts advised Judge

Hastings that the Office had no authority to do so.

On June 3, 1983, the Investigating Committee filed a petition with the United States District Court for the Southern District of Florida for access to the materials of the grand jury that had indicted Borders and Judge Hastings. The Court granted the petition and at the same time denied Judge Hastings access to the materials,[12] holding that his request was premature since the Committee's work was still at the investigative stage where "the required procedural protections are minimal at most." In re Petition to Inspect and Copy Grand Jury Materials, 576

12. Judge Hastings also sought and was denied full public disclosure of the grand jury materials as an alternative to his request that the Investigating Committee be denied disclosure.

F. Supp. 1275, 1284 (S.D. Fla. 1983), aff'd, No. 84-5003, slip op. (11th Cir. June 20, 1984).[13]

The Investigating Committee has not completed its work. No report has been filed containing its recommendations nor have any hearings been held. Committee counsel indicated at oral argument that the inquiry awaits action by this Court on the motions.

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13. Both the petition in the District Court and the appeal were heard by designated judges because all the judges of the District Court of the Southern District of Florida recused themselves, as did all the regular judges of the Court of Appeals for the Eleventh Circuit. The judges of the District Court of the Southern District of Florida have recused themselves in all matters relating to the complaint against Judge Hastings. In another somewhat related case, the appeal from and mandamus relating to Judge Hastings' decision that was allegedly influenced by a bribe, United States v. Romano, 523 F. Supp. 1209 (S.D. Fla. 1981), a panel of the Eleventh Circuit refused Judge Hastings request that all active judges of the Circuit recuse.

III. Preliminary Issues

It is against this background that the Court must first consider several threshold issues raised by the defendants concerning this Court's jurisdiction over the subject matter of the complaint and ripeness of the various claims for review. The Act provides that "all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise." 28 U.S.C. § 372(c)(10). Defendants contend this withdrawal of jurisdiction precludes any review by this Court of Judge Hastings' claims in Count Two regarding the application of the Act to him. While there is always a basic presumption of judicial review and a Congressional intent to preclude review must be explicit, see Abbott Laboratories v. Gardner, 387 U.S.

136, 140 (1967), the language of the Act and its legislative history[14] plainly show that Congress intended to establish an absolute bar against judges under inquiry seeking judicial review of actions taken against them pursuant to the Act. Congress's power to preclude such judicial review is well established. Cf. Briscoe v. Bell, 432 U.S. 404, 414-15 (1977); Weinberger v. Salfi, 422 U.S. 749, 762 (1975).[15] Accordingly, this Court must

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14. See H.R. Rep. 1313, 96th Cong., 2d Sess. 13 (1980).

15. Whether the Due Process clause bars Congress from denying judicial review of orders and determinations under the Act is not a contention specifically raised by plaintiff's amended complaint. Given the extensive rights of review the Act does provide before mature judges of the Judicial Conference and the councils, this Court holds that the absence of more formal judicial review does not violate the Due Process clause. See Crowell v. Benson, 285 U.S. 22, 87 (1932) (Brandeis, J., dissenting); Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir.), cert. denied, 335 U.S. 887 (1948).

conclude it has no jurisdiction over Judge Hastings' Count Two claims concerning the present and possible future application of the Act to him.

However, the Act does not bar judicial review of the facial validity of the statute itself. By its terms, the Act bars review only of "orders and determinations" made against individual judges. 28 U.S.C. § 372(c)(10). This was not meant to bar review of the constitutionality of the Act itself. Moreover, it is doubtful whether Congress has the power to withdraw jurisdiction from the courts of a statute's facial validity. See Johnson v. Robison, 415 U.S. 361, 366-67 (1974). Accordingly, this Court finds it does have subject-matter jurisdiction over plaintiff's Count One claims regarding the facial validity of the Act.

Defendants next claim in regard to Count One that the "only issue ripe for review is whether it is constitutional for judges to investigate judges for conduct alleged to prejudice the effective and efficient administration of the courts." Defendants' Reply filed July 5, 1984, at 3, 5. They insist that because the Judicial Council, the Judicial Conference, and the Standing Committee have not yet taken any action in Judge Hastings' case, the facial validity of the Act is too hypothetical for adjudication as to them. To so hold would prevent full judicial review of the constitutionality of the Act, because as soon as these bodies act the defendants will no doubt assert that orders issued are unreviewable. In any event, the facts do not support a ripeness challenge. The situation here is far different from those cases where a lack of

ripeness was properly found because neither the plaintiff nor the defendant agencies had engaged in conduct triggering the requisite claimed injury. See, e.g., International Longshoremen's and Warehousemen's Union, Local 37 v. Boyd, 347 U.S. 222, 224 (1954); Martin Tractor Co. v. Federal Election Comm., 627 F.2d 375, 379 (D.C. Cir.), cert. denied, 449 U.S. 954 (1980). Judge Hastings has allegedly engaged in conduct triggering the Investigating Committee's present work. Given the seriousness of the misconduct alleged, it seems disingenuous for defendants to suggest that action by the Judicial Council, the Standing Committee or the Conference is remote and uncertain in his case. Nor would the occurrence of any future acts provide significant new facts to aid this Court's adjudication of the Act's facial validity. See Duke Power Co.

v. Carolina Environmental Study Group, 438 U.S. 59, 82 (1978); Regional Rail Reorganization Act Cases, 419 U.S. 102, 143 (1974). Principles of judicial economy also counsel against piecemeal adjudication of Judge Hastings' broad complaint, directed as it is to all aspects of the Act. The motion to dismiss on ripeness grounds is accordingly denied.

IV. Judge Hastings' Constitutional Claims

This Court therefore must, now address the plaintiff's constitutional claims.

A. Separation of Powers

Judge Hastings initially contends that Congress wholly lacks power to provide the judiciary with machinery for disciplining Article III judges because the separation of powers doctrine prevents any intrusion by the legislature into the independence of the judiciary as guaran-

teed by the Constitution. He focuses particularly on the delegation by Congress of subpoena power to the judiciary coupled with the grants of authority to discipline judges including the provision authorizing the Judicial Conference to present facts obtained by this process to the House of Representatives with recommendation for impeachment. Judge Hastings goes so far as to suggest that under the Constitution an Article III judge such as himself can only be disciplined for misconduct[16] by impeachment, and that proceedings questioning his behavior can only be held by the appropriate bodies of Congress.

Judge Hastings misconceives the purposes of the Act and his obligations

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16. By misconduct, he means a violation of the "good behavior" standard set out in Article III and in every judge's commission of appointment by the President. He concedes that bribery violates good behavior.

as a member of the judiciary. His argument lacks merit.

The Framers of the Constitution regarded an independent judiciary, free from the fear and favor of other branches of the national government, as vital to safeguard the liberty of the people and the integrity of the government. See The Federalist No. 78, at 226-33, No. 81, at 242-45 (A. Hamilton) (R. Fairfield ed. 1966); 2 J. Story, Commentaries on the Constitution of the United States 391-92 (5th ed. 1891). The independence of the judicial branch was to be secured in part by providing the individual judges with life tenure on good behavior and a salary secure from reduction. U.S. Const., art. III, sec. 1. These provisions were meant to satisfy "the imperative need for total and absolute independence of judges in deciding cases." Chandler v. Judicial

Council, 398 U.S. at 84. But in establishing a government of separated and interdependent powers, the Framers never intended that the independence of any officeholder, including judges, be so absolute as to threaten the integrity and orderly functioning of that officeholder's branch of government. The Framers, after all, feared nothing more than the tyranny of megalomaniacal despots. Thus the Constitution established, and the cases have repeatedly recognized, that the integrity and independence of the branch must take precedence over the independence of the individual officeholder. See, e.g., United States v. Nixon, 418 U.S. 683 (1974); Nixon v. Administrator of General Services, 433 U.S. 425, 441 (1977); United

States v. Brewster, 408 U.S. 501 (1972).[17]

From the early days of the Republic, limitations have been placed on the independence of any individual federal judge in order to assure the integrity and independence of the judicial branch. The first Congress recognized that a judge could be subject to criminal trial and provided that upon any conviction for bribery, he or she was to be "forever disqualified to hold any office." Act of

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17. As the Court observed in Brewster, regarding Speech or Debate Clause immunities of Congressmen designed to provide protections for the independence of that branch analogous to those considered today: "The immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators." 408 U.S. at 507.

1790, ch.9, sec. 21, 1 Stat. 117.[18] In the Judiciary Act of 1789, 1 Stat. 73, the first Congress

> provided not only for the size and composition of the Supreme Court but also for the times and place for sitting, its internal organization, and other matters. It created inferior courts and prescribed membership, terms, places of sitting, and jurisdiction.

Killian, Constitutional Issues Raised by the Proposed Judicial Conduct and Disability Act of 1979, reprinted in Judicial Tenure and Discipline -- 1979-80: Hearings before the Subcommittee on Courts, Civil

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18. The Act also provided that a judge convicted of bribery could be fined and jailed, at the court's discretion. Id. Subsequent cases, including Judge Hastings' own criminal trial, have disposed of the notion that a sitting federal judge cannot be brought to criminal trial until he is removed from office by impeachment. See United States v. Claiborne, 727 F.2d 842 (9th Cir. 1984); United States v. Hastings, 681 F.2d 706 (11th Cir. 1982), cert. denied, 103 S. Ct. 1188 (1983); United States v. Isaacs, 493 F.2d 1124 (7th Cir.), cert. denied sub nom. Kerner v. United States, 417 U.S. 976 (1974).

Liberties, and the Administration of Justice, 96th Cong., 1st and 2d Sess. 705 (1980). In addition, Congress required a judge with an interest in a case to recuse, Act of May 8, 1792, ch. 36, sec. 11, 1 Stat. 278 (codified at 28 U.S.C. § 455), and made it a "high misdemeanor" for a judge to practice law, Act of December 18, 1812, ch. 5, 2 Stat. 788 (codified at 28 U.S.C. § 454). Since those early years, Congress has placed limits on individual Article III judges in many other ways, such as requiring disclosure of personal wealth (and penalizing nondisclosure),[19] mandating that criminal trials be conducted within a specified

19. Ethics in Government Act of 1978, 28 U.S.C. App. § 301 et seq. The Act's constitutionality as applied to judges was upheld in DuPlantier v. United States, 606 F.2d 654 (5th Cir. 1979), cert. denied, 449 U.S. 1076 (1981).

time,[20] and prescribing various procedural rules.[21] Congress's power to enact these and other limitations on the personal freedom of individual federal judges, pursuant to its power to make all laws "necessary and proper for carrying into Execution" the powers vested by the Constitution in the judiciary, art. I, sec. 8, cl. 18, cannot any longer be seriously doubted.

As the third branch of government, the judiciary must function. It must organize, it must have rules, it must be effectively managed. To suggest that the

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20. Speedy Trial Act of 1972, 18 U.S.C. § 3161 et seq. A claim that the Act was an "unconstitutional encroachment on the judiciary" was rejected in United States v. Brainer, 691 F.2d 691 (4th Cir. 1982).

21. See, e.g., Hanna v. Plumer, 380 U.S. 460, 471-72 (1965) (upholding congressional power under the Necessary and Proper Clause to set rules for civil procedure in federal courts).

judicial branch consists only of individual judges free to work or not work, cooperate or obstruct, uphold or demean court processes, acting however personal whim may dictate checked only by the remote chance of loss of office through impeachment, is naive and irresponsible. The independence of the judiciary depends both on the courage and integrity of individual judges and on the public perception of the institution as fair, impartial and efficient. The judiciary has the inherent power to govern itself in a manner that will achieve these ends.

The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 represents a legitimate exercise of Congress's "necessary and proper" power to effectuate that judicial power. By redefining the composition of the Judicial Councils and enhancing and perfecting

their inherent authority, Congress was in no respect intruding upon judicial independence. Rather, it was simply recognizing the need to give the courts reasonable means to put the judiciary's own house in order. See Chandler v. Judicial Council, 398 U.S. at 85, 86 n.7. Cf. Nixon v. Administrator of General Services, 433 U.S. at 443-44. The Judicial Conference itself has recognized that placing disciplinary machinery within the judicial branch is "least disruptive of our constitutional concept of an independent judiciary." Judicial Tenure and Discipline -- 1979-80: Hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, 96th Cong., 1st and 2d Sess. 68 (1980) (statement of Hon. Elmo B. Hunter, chairman, Committee on Court Administration of the Judicial Conference of the United States).

Moreover, the Act's provision for recommending impeachment to the House of Representatives does nothing to impinge on the exclusive power of Congress over impeachment. The Judicial Conference as the highest manager of the third branch is surely entitled with or without benefit of the Act to seek the aid of Congress where removal of a judge is appropriate. If the Judicial Conference forwards an impeachment recommendation to the House of Representatives, the House is free to pursue the matter or ignore it as it chooses. Nor has the Congress made any change in its procedures or impeachment standards. There is nothing in the Constitution that bars any person or group from recommending impeachment. Judges have always been subject to this hazard and the repercussions it may carry.

Judge Hastings also contends that the impeachment provision of Article II somehow shields him from any discipline short of impeachment. But even if one accepts the much-debated proposition that impeachment is the sole means of removing an Article III judge from office, it simply does not follow that other forms of discipline that do not remove a judge from office are foreclosed.[22] Cf. Nixon v. Sirica, 487 F.2d 700, 711 (D.C. Cir. 1973)

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22. Ultimately, Judge Hastings' argument collapses of its own weight. He insists that because of the fundamental need to protect judicial independence, impeachment is the sole remedy for judicial misconduct, and that as an essential attribute of impeachment, the power to investigate judicial misconduct cannot be delegated to the judicial branch. Instead, he suggests Congress could establish an elaborate investigative machinery under its own auspices. It is difficult to see how judicial independence would be more protected by lodging the investigative apparatus in a bureaucratic agency or congressional body rather than in the judicial branch itself.

(en banc), holding that the impeachment clause does not provide special immunities from other investigative process.

To the extent Judge Hastings seems to believe that the independence of the judiciary protects an Article III judge from criticism by his peers as a matter of law, he misreads the Constitution and ignores historical precedents. Article III federal judges by the nature of their office live in the eye of the storm. Their very independence evokes disagreement and challenge. The public, the bar, the law schools, the press all comment relentlessly on judicial conduct. As public servants, judges cannot expect to be immune from criticism. That a judge's peers may find his behavior unacceptable is of no particular added consequence. Certainly, within the adjudicatory process itself a judge may receive sharp rebuke.

The Act does no more than to assure fair hearing for the judge facing possible discipline. Contrary to Judge Hastings' repeated and strident claims, the Act's disciplinary mechanism does nothing to encroach upon the essential independence of judges to decide cases in accord with their understanding of the law and to rule accordingly. In fact, Congress in this instance has again scrupulously observed the separation of powers by simply strengthening the judiciary's ability to monitor its own performance. It is the judges themselves who under the Constitution are the proper guardians of the independence and integrity of the third branch, and they must not shirk this trust.

In addition to his separation of powers arguments, Judge Hastings attacks the provisions of the Act on two broad

grounds.[23] First, he contends that the standards for misconduct are vague and overbroad. Second, he contends that the Act denies due process to judges under inquiry. Again, these challenges to the Act must be rejected.

B. Vagueness and Overbreadth[24]

The vagueness claim lacks merit. One standard for conduct subject to investiga-

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23. This case does not focus on other areas of the Act involving disability because of age or illness, early retirement, readjustment of work loads, and other comparable administrative matters because these aspects do not involve Judge Hastings' present difficulties. In any event, the analysis of the statute that follows would lead to no different result were these areas the subject of the constitutional challenge.

24. While intertwined, vagueness and overbreadth are different concepts. A law that is overbroad proscribes a substantial amount of constitutionally protected conduct. A vague law is one whose standard is so indeterminate that one cannot tell what conduct it proscribes. See Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494-95 (1982).

tion and sanction is obviously conduct that in itself would justify impeachment, since the Judicial Conference may recommend that the House of Representatives consider impeachment. 28 U.S.C. § 372(c)(7)(B),(8). The complaint against Judge Hastings alleges that he conspired to take a bribe and to obstruct justice. It is difficult to imagine any conduct by a judge, if it occurred, more worthy of impeachment. No judge accused of these types of conduct can credibly argue that he lacked advance notice that they were forbidden.

Although it is well settled that "[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness," Parker v. Levy, 417 U.S. 733, 756 (1974), Judge Hastings makes a broader challenge that will be considered. He seems to contend that even if some of

his alleged conduct clearly is reached by the statute, he is still being investigated for other conduct that is too vaguely defined and that is constitutionally protected. He urges that given the broad scope of the Act, it should not withstand constitutional scrutiny.

The statutory standard, "conduct prejudicial to the effective and expeditious administration of the business of the courts," was necessarily broad.[25] The legislative history notes that this standard was "intended to include willful misconduct in office, willful and persistent failure to perform duties of the office, habitual intemperance, and other conduct prejudicial to the administration of justice that brings the judicial office

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25. Cf. Arnett v. Kennedy, 416 U.S. 134, 158-64 (1974) (upholding "for cause" removal standard of civil service statute against vagueness/overbreadth attack).

into disrepute." S. Rep. No. 362, 96th Cong., 1st Sess. 9 (1979), reprinted in 1980 U.S. Code Cong. & Ad. News 4315, 4323.[26] The legislative history further notes that this statutory standard was intended to draw guidance from the Code of Judicial Conduct for the United States Judges, published by the Judicial Conference,[27] among other sources. Id. In adopting this standard, this Court holds that Congress therefore did not intend to authorize investigation and formal proceedings against a judge for one or two isolated instances of possibly unethical

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26. The House report is to the same general effect. See H.R. Rep. No. 1313, 96th Cong., 2d Sess. 10 (1980).

27. The Conference's Advisory Committee on Judicial Activities issues advisory opinions interpreting the Code to judges who seek advance guidance for their conduct. These opinions are published regularly by the Administrative Office of the United States Courts.

or inappropriate official conduct unless such conduct, by itself, could amount to an impeachable offense. Congress recognized that a clearly established pattern of similar or disparate unethical judicial conduct, if unchecked, could so prejudice the administration of the courts and bring the judiciary into such disrepute that formal disciplinary action would be required.[28] So read, the Act is clearly

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28. It should be stressed that Congress's concern about behavior bringing the judicial office into disrepute was focused on a judge's judicial conduct and not primarily on personal extrajudicial behavior. It was for this reason that a separate standard for misbehavior, "conduct prejudicial to the administration of justice by bringing the judicial office into disrepute," was deleted by the Senate Judiciary Committee for fear that such a general disrepute standard directly embodied in the statute could be used to intrude into a judge's personal life unrelated to his or her judicial conduct. See 125 Cong. Rec. S15,385 (daily ed. Oct. 30, 1979)(statement of Sen. Thurmond). This deletion was not intended to dilute Congress's concern for the public

not vague. Cf. Roberts v. United States Jaycees, 52 U.S.L.W. 5076, 5081-82 (U.S. July 3, 1984).

Thus the statutory mechanism was intended to be available if no collegial resolution is possible for the relatively rare case where the charges, by their individual weight or by their weight as a pattern taken together, are sufficiently serious to bring into question the

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28. (Continued)
appearance of integrity in the judicial branch. See also 126 Cong. Rec. S13,860 (daily ed. Sept. 30, 1980) (remarks of Sen. DeConcini) (Act intended "to remedy matters relating to a judge's condition or conduct which interfere with his performance and responsibilities"). This legislative history further supports the conclusion that the statutory machinery was intended only for impeachable conduct or conduct showing such a pattern of misbehavior as to interfere with a judge's duties or to threaten the public's perception of the integrity of the judicial system.

integrity of the judicial system itself.[29] The complaint against Judge Hastings, if established, presents such a gross pattern of ethical violations.

Given the Act's clear emphasis on invoking the Act's investigative machinery only for serious misconduct, it was not necessary for Congress to compile an exhaustive catalogue of all forms of misconduct targeted by the Act. Indeed, it would have been impossible, because excepting those most rare cases of single impeachable acts, the pattern and the varied context of an individual judge's behavior must remain critical to determin-

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29. Indeed, this reading of the Act led Congress ultimately to reject a Senate bill that would have created a special Court on Judicial Conduct and Disability, which would have too easily allowed complaints against judges to be pressed to a formal adversary proceeding with a danger of possibly chilling judicial independence. See H.R. Rep. No. 1313, 96th Cong., 2d Sess. 18-19 (1980).

ing whether the statute's investigative processes will be invoked. Such an inquiry is too subtle for more rigid legislative codification.

Moreover, as discussed above, Judge Hastings' argument that the Act chills his and other judges' constitutionally protected independence fundamentally misconstrues the nature of the judicial independence that the Constitution was intended to protect. He continues to confuse the independence of the judiciary with his desire for unbridled personal independence.[30]

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30. In addition, the mere presence of a "chilling effect," without some other concrete harm, past or immediately threatened, is insufficient to state an overbreadth claim. See United Presbyterian Church v. Reagan, No. 83-1012, slip op. at 5 (D.C. Cir. July 17, 1984). No such harm is alleged here, only a vague and unsupported allegation of a chill to Judge Hastings' judicial independence is urged. Judge Hastings' right to decide cases assigned to him and to state his reasons is not affected.

C. Due Process

Judge Hastings' due process claims equally lack merit. He contends that the Act creates "a Star Chamber in which the accused has no right to confront the evidence against him." This is patently incorrect. The Act expressly provides a judge under inquiry with, among other rights, the opportunity to appear before the investigating committee, present evidence and compel its production if necessary, as well as to cross-examine witnesses. 28 U.S.C. § 372(c)(10). It is true that the Act does not expressly provide the same confrontational rights in its provision for additional investigation by the Judicial Council, the Judicial Conference or its Standing Committee. But such rights are implicit in the statutory design providing that additional confrontational hearings "may" be held. Congress

hardly could have intended to allow a judge's confrontational rights to be sidestepped by the device of allowing him to confront evidence at a foreshortened investigating committee proceeding, saving most of the evidence for presentation at later proceedings at which confrontation would be barred. Fairly read, the Act requires that a judge under inquiry have the right to confront all the evidence against him at whatever stage it is presented.[31] This, of course, does not mean an accused judge has a right to re-confront old evidence at every stage where

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31. The Act's provision for discretionary authority on the part of judicial councils and the Conference to conduct additional investigation if they deem it appropriate, 28 U.S.C. § 372(c)(6)(A), (8), was designed simply to give discretion to hold further hearings, not to withhold due process rights from a judge under inquiry at those hearings.

it is considered. But a judge under inquiry has the right under the Act to confront at some point all the evidence against him, and the Court so holds.

Judge Hastings' contention that the Act impermissibly combines investigative and adjudicatory power, so as to render impossible a fair adjudication, similarly lacks merit. The mere combination of such powers, by itself, does not violate due process. Withrow v. Larkin, 421 U.S. 35, 58 (1975). Judge Hastings simply has made no credible showing that under the procedures established by the Act "the risk of unfairness is intolerably high." Id. It is, of course, inevitable that in any peer-review mechanism as established here, members of judicial councils occasionally may have prior knowledge of allegations of misbehavior before they are asked to sit in judgment on such charges.

But prior knowledge of some of the facts of a case does not by itself establish bias. See Withrow v. Larkin, 421 U.S. at 47-50; FTC v. Cement Institute, 333 U.S. 683, 701 (1948). To protect against the possibility of actual bias from prior knowledge or personal animosities within a circuit, Congress gave review authority to the more remote and scattered members of the Judicial Conference. The Act thus cannot be said on its face to violate the due process requirement of an impartial tribunal. As for Judge Hastings' particular concerns with the composition of the Investigating Committee and its actions to date, those are not reviewable here. Judge Hastings must follow the statutory review process. See 28 U.S.C. § 372(c)(10).

This Court concludes that the Act shows a sensitivity to the procedural rights of judges under inquiry and

protects them with adequate care to satisfy the fundamental fairness required by the due process clause.

D. Other Issues

Judge Hastings contends the government's refusal to pay for his legal fees to defend against the disciplinary action diminishes his compensation in office in violation of Article III of the Constitution.[32] Congress, of course, is forbidden by the compensation clause from diminishing directly the salary of federal judges. See United States v. Will, 449 U.S. 200, 225-26 (1980). An indirect diminution of a judge's disposable income, triggered by that judge's own conduct, is entirely different. See Duplantier v. United States, 606 F.2d 654, 669 (5th Cir.

32. "The Judges ... shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office." U.S. Const., art. III, sec. 1.

1979), upholding civil penalty provisions of the Ethics in Government Act, 28 U.S.C. App. § 301 et seq., as applied to judges. This claim has no more substance than the contention of judges assigned to duties away from their homes that their compensation is diminished because their per diem allowance does not cover actual necessary expenses.[33]

Finally, upon further review of this complaint in the light of the foregoing

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33. This disposition of Judge Hastings' constitutional claim does not foreclose him from pursuing his request for legal fees with the Eleventh Circuit Judicial Council. The decision of the Director of the Administrative Office of the United States Courts on May 6, 1983, to deny his request for legal fees is not conclusive. Legislative history seems clearly to show a congressional intent to pay for attorney fees for a judge under inquiry. See H.R. Rep. 1313, 96th Cong., 2d Sess. 22 (1980). See also Memorandum of Director of Administrative Office of United States Courts to Judges, Magistrates, Circuit Executives and Clerks of Court, Dec. 30, 1980, at 4 (interpreting statute to authorize payment of attorney fees).

analysis, it is clear that the two remaining counts must also be dismissed, on the Court's own motion.[34] Count Three asks the Court to review the motives underlying Judge Godbold's order instituting the investigation. That order simply is not reviewable by this type of collateral lawsuit, see 28 U.S.C. § 372(c)(10), even if Judge Hastings seeks to clothe his request for review in the language of conspiracy. In no other respect does Count Three state a cause of action on which relief can be granted.

Count Four states on its face no Privacy Act claim in regard to past actions by the Justice Department, since

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34. These counts have not been briefed or argued by the parties. Their lack of merit is so plain that the Court believes it better expeditiously to dispose of the entire case than to leave these remaining claims dangling.

the Act requires neither that Judge Hastings be notified nor approve of any disclosures made. See 5 U.S.C. § 552a(b)(7), (e)(8). The Justice Department memorandum mentioned in paragraph 57 of the amended complaint merely states in most general terms matters already of public record. No violation of the regulations cited emerges. As for future cooperation between the Justice Department and the Investigating Committee, that has been resolved by In re Petition, 576 F. Supp. 1275 (S.D. Fla. 1983), aff'd, No. 84-5003, slip op. (11th Cir. June 20, 1984). Finally, the due process allegations against the Investigating Committee defendants in Count Four represent yet another attempt by Judge Hastings to short-circuit the exclusive review process vested by the Act in the judicial councils and the Conference, and this Court cannot

consider them. See 28 U.S.C. § 372(c)(10). Thus no cause of action is stated in Count Four.

Conclusion

For reasons stated, the Court finds that the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 withstands close constitutional scrutiny and is reasonably fashioned by Congress to improve judicial administration so as to enable the judiciary to preserve and protect its independence. The pending investigation by the Eleventh Circuit of Judge Hastings' behavior will not be enjoined. The complaint is dismissed with prejudice. An appropriate Order is filed herewith.

/s/ Gerhard A. Gesell
UNITED STATES DISTRICT JUDGE

July 25, 1984.

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 84-5576 September Term, 1984

Honorable Alcee L. Hastings,
U.S. District Judge,
Appellant
v.

Judicial Conference of the United States, et al.

Civil Action No. 83-03850

Filed Aug. 13, 1985
George A. Fisher
Clerk

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

Before: EDWARDS and BORK, Circuit Judges, and McGOWAN, Senior Circuit Judge

J U D G M E N T

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the judgment of the District Court as

to appellees on Count One is vacated, and the dismissals of Count Two, Count Three and Count Four are affirmed, and the case is remanded to the District Court for entry of an order of dismissal without prejudice, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
For the Court

/s/ George A. Fisher
Clerk

Date : August 13, 1985

Opinion for the Court filed by Senior Circuit Judge McGowan.

Opinion concurring in part filed by Circuit Judge Edwards.

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 84-5576 September Term, 1985

Honorable Alcee L. Hastings,
U.S. District Judge,

CA No. 83-03850

v.

Filed Nov. 1, 1985
George A. Fisher
Clerk

Judicial Conference
of the United States

Before: EDWARDS and BORK; Circuit Judges,
McGOWAN, Senior Circuit Judge

O R D E R

Upon consideration of appellant's petition for rehearing, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT
GEORGE A. FISHER, CLERK

BY:
/s/ Robert A. Bonner
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 84-5576 September Term, 1985

Honorable Alcee L. Hastings,
U.S. District Judge,

CA No. 83-03850

Filed Nov. 1, 1985
George A. Fisher
Clerk

v.

Judicial Conference of the United States, et al.

BEFORE: Robinson, Chief Judge; Wright, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, Circuit Judges; McGowan, Senior Circuit Judge

O R D E R

The suggestion for rehearing en banc of appellant Alcee L. Hastings has been circulated to the full Court and no member has requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court en banc, that the suggestion is denied.

Per Curiam

FOR THE COURT
GEORGE A. FISHER, CLERK

BY:
/s/ Robert A. Bonner
Chief Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

The Honorable Alcee L. Hastings, Plaintiff,	Civil Action No. 83-3850
v.	Filed July 25, 1984 James F. Davey, Clerk
Judicial Conference of the United States, et al., Defendants.	

ORDER

Upon consideration of all motions filed by the parties, the respective oppositions thereto, the arguments of counsel, and the entire record of the case, for the reasons stated in the accompanying Memorandum, it is hereby

ORDERED that the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, insofar as it authorizes and establishes procedures for the investigation and disposition of complaints relat-

ing to the conduct of Article III judges, is declared constitutional on its face; and it is further

ORDERED that plaintiff's motion for summary judgment as to Count One of the amended complaint is denied and defendants' motion for summary judgment as to Count One is granted; and it is further

ORDERED that Counts Two, Three and Four of the amended complaint are dismissed with prejudice.

/s/ Gerhard A. Gesell
UNITED STATES DISTRICT JUDGE

July 25, 1984.

CONSTITUTION OF THE UNITED STATES

Article. I.

Section. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section. 2. * * *

[Clause 5.] The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section. 3. * * *

[Clause 6.] The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried the Chief

Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

[Clause 7.] Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section. 8. Congress shall have Power

* * *

[Clause 9.] to constitute Tribunals inferior to the Supreme Court; . . .

[Clause 18.] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitu-

tion in the Government of the United States, or in any Department or Officer thereof.

Article. II.

Section. 1. The Executive Power shall be vested in a President of the United States of America. * * *

Section. 2. * * *

[Clause 2.] He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment

of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

* * *

Section. 4. The President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Article. III.

Section. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which

shall not be diminished during their Continuance in Office.

Section. 2. The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

AMENDMENT I.

Congress shall make no law respecting an establishment of religion, or prohibit-

ing the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Public Law 96-458
96th Congress

An Act

To revise the composition of the judicial councils of the Federal judicial circuits, to establish a procedure for the processing of complaints against Federal judges, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

Section 1. This act may be cited as the "Judicial Councils Reform and Judicial Conduct and Disability Act of 1980".

JUDICIAL COUNCILS OF THE CIRCUITS

Sec. 2.(a) Section 332(a) of title 28, United States Code, is amended to read as follows:

"(a)(1) The chief judge of each judicial circuit shall call, at least twice in each year and at such places as he may designate, a meeting of the judicial council of the circuits, consisting of --

"(A) the chief judge of the circuit, who shall preside;

"(B) that number of circuit judges fixed by majority vote of of all such judges in regular active service; and

"(C) that number of district judges of the circuit fixed by majority vote of all circuit judges in regular active service, except that --

"(i) if the number of circuit judges fixed in accordance with subparagraph (B) of this paragraph is less than six, the number of district judges fixed in accordance with this subparagraph shall be no less than two; and

"(ii) if the number of circuit judges fixed in accordance with subparagraph (B) of this paragraph is six or more, the number of district judges fixed in accordance with this subparagraph shall be no less than three.

"(2) Members of the council shall serve for terms established by a majority vote of all judges of the circuit in regular active service.

"(3) The number of circuit and district judges fixed in accordance with paragraphs (1)(B) and (1)(C) of this subsection shall be set by order of the court of appeals for the circuit no less than six months prior to a scheduled meeting of the council so constituted.

"(4) Only circuit and district judges in regular active service shall serve as members of the council.

"(5) No more than one district judge from any one district shall serve simultaneously on the council, unless at least one district judge from each district within the circuit is already serving as a member of the council.

"(6) In the event of the death, resignation, retirement, or disability of a member of the council, a replacement member shall be designated to serve the remainder of the unexpired term by the chief judge of the circuit.

"(7) Each member of the council shall attend each council meeting unless excused by the chief judge of the circuit.".

(b) Section 332(c) of title 28, United States Code, is amended by striking out "quarterly" and inserting in lieu thereof "semiannually".

(c) Section 332(d) of title 28, United States Code, is amended to read as follows:

"(d)(1) Each judicial council shall make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit. Each council is authorized to hold

hearings, to take sworn testimony, and to issue subpoenas and subpoenas duces tecum. Subpoenas and subpoenas duces tecum shall be issued by the clerk of the court of appeals, at the direction of the chief judge of the circuit or his designee and under the seal of the court, and shall be served in the manner provided in rule 45(c) of the Federal Rules of Civil Procedure for subpoenas and subpoenas duces tecum issued on behalf of the United States or an officer or agency thereof.

"(2) All judicial officers and employees of the circuit shall promptly carry into effect all orders of the judicial council.

"(3) Unless an impediment to the administration of justice is involved, regular business of the courts need not be referred to the council.".

(d)(1) The section heading for section 332 of title 28, United States Code, is amended to read as follows:

"§ 332. Judicial councils of circuits".

(2) The item relating to section 332 in the section analysis for chapter 15 of title 28, United States Code, is amended to read as follows:

"332. Judicial councils of circuits.".

PROCEDURES WITHIN JUDICIAL COUNCILS

SEC. 3.(a) Section 372 of title 28, United States Code, is amended by adding at the end thereof the following new subsection:

"(c)(1) Any person alleging that a circuit, district, or bankruptcy judge, or a magistrate, has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or alleging that such a judge or magistrate is unable to discharge all the

duties of office by reason of mental or physical disability, may file with the clerk of the court of appeals for the circuit a written complaint containing a brief statement of the facts constituting such conduct.

"(2) Upon receipt of a complaint filed under paragraph (1) of this subsection, the clerk shall promptly transmit such complaint to the chief judge of the circuit, or, if the conduct complained of is that of the chief judge, to that circuit judge in regular active service next senior in date of commission (hereafter, for purposes of this subsection only, included in the term 'chief judge'). The clerk shall simultaneously transmit a copy of the complaint to the judge or magistrate whose conduct is the subject of the complaint.

"(3) After expeditiously reviewing a complaint, the chief judge, by written order stating his reasons, may --

"(A) dismiss the complaint, if he finds it to be (i) not in conformity with paragraph (1) of this subsection, (ii) directly related to the merits of a decision or procedural ruling, or (iii) frivolous; or

"(B) conclude the proceeding if he finds that appropriate corrective action has been taken.

The chief judge shall transmit copies of his written order to the complainant and to the judge or magistrate whose conduct is the subject of the complaint.

"(4) If the chief judge does not enter an order under paragraph (3) of this subsection, such judge shall promptly--

"(A) appoint himself and equal numbers of circuit and district judges of the circuit to a special committee to investigate the facts and allegations contained in the complaint;

"(B) certify the complaint and any other documents pertaining thereto to each member of such committee; and

"(C) provide written notice to the complainant and the judge or magistrate whose conduct is the subject of the complaint of the action taken under this paragraph.

"(5) Each committee appointed under paragraph (4) of this subsection shall conduct an investigation as extensive as it considers necessary, and shall expeditiously file a comprehensive written

report thereon with the judicial council of the circuit. Such report shall present both the findings of the investigation and the committee's recommendations for necessary and appropriate action by the judicial council of the circuit.

"(6) Upon receipt of a report filed under paragraph (5) of this subsection, the judicial council--

"(A) may conduct any additional investigation which it considers to be necessary;

"(B) shall take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit, including, but not limited to, any of the following actions:

> "(i) directing the chief judge of the district of the magistrate whose conduct is the

subject of the complaint to take such action as the judicial council considers appropriate;

"(ii) certifying disability of a judge appointed to hold office during good behavior whose conduct is the subject of the complaint, pursuant to the procedures and standards provided under subsection (b) of this section;

"(iii) requesting that any such judge appointed to hold office during good behavior voluntarily retire, with the provision that the length of service requirements under section 371 of this title shall not apply;

"(iv) ordering that, on a temporary basis for a time certain, no further cases be assigned to any judge or magistrate whose conduct is the subject of a complaint;

"(v) censuring or reprimanding such judge or magistrate by means of private communication;

"(vi) censuring or reprimanding such judge or magistrate by means of public announcement; or

"(vii) ordering such other action as it considers appropriate under the circumstances, except that (I) in no circumstances may the council order removal from office of any judge appointed to hold office during

good behavior, and (II) any removal of a magistrate shall be in accordance with section 631 of this title and any removal of a bankruptcy judge shall be in accordance with section 153 of this title; and

"(C) shall immediately provide written notice to the complainant and to such judge or magistrate of the action taken under this paragraph.

"(7)(A) In addition to the authority granted under paragraph (6) of this subsection, the judicial council may, in its discretion, refer any complaint under this subsection, together with the record of any associated proceedings and its recommendations for appropriate action, to the Judicial Conference of the United States.

"(B) In any case in which the judicial council determines, on the basis of a complaint and an investigation under this subsection, or on the basis of information otherwise available to the council, that a judge appointed to hold office during good behavior has engaged in conduct--

> "(i) which might constitute one or more grounds for impeachment under article I of the Constitution; or
>
> "(ii) which, in the interest of justice, is not amenable to resolution by the judicial council, the judicial council shall promptly certify such determination, together with any complaint and a record of any associated proceedings, to the

Judicial Conference of the United States.

"(C) A judicial council acting under authority of this paragraph shall, unless contrary to the interests of justice, immediately submit written notice to the complainant and to the judge or magistrate whose conduct is the subject of the action taken under this paragraph.

"(8) Upon referral or certification of any matter under paragraph (7) of this subsection, the Judicial Conference, after consideration of the prior proceedings and such additional investigation as it considers appropriate, shall by majority vote take such action, as described in paragraph (6)(B) of this subsection, as it considers appropriate. If the Judicial Conference concurs in the determination of the council, or makes its own determination, that consideration of impeachment

may be warranted, it shall so certify and transmit the determination and the record of proceedings to the House of Representatives for whatever action the House of Representatives considers to be necessary.

"(9)(A) In conducting any investigation under this subsection, the judicial council, or a special committee appointed under paragraph (4) of this subsection, shall have full subpoena powers as provided in section 332(d) of this title.

"(B) In conducting any investigation under this subsection, the Judicial Conference, or a standing committee appointed by the Chief Justice under section 331 of this title, shall have full subpoena powers as provided in that section.

"(10) A complainant, judge, or magistrate aggrieved by a final order of the chief judge under paragraph (3) of this

subsection may petition the judicial council for review thereof. A complainant, judge, or magistrate aggrieved by an action of the judicial council under paragraph (6) of this subsection may petition the Judicial Conference of the United States for review thereof. The Judicial Conference, or the standing committee established under section 331 of this title, may grant a petition filed by a complainant, judge, or magistrate under this paragraph. Except as expressly provided in this paragraph, all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise.

"(11) Each judicial council and the Judicial Conference may prescribe such rules for the conduct of proceedings under this subsection, including the processing

of petitions for review, as each considers to be appropriate. Such rules shall contain provisions requiring that--

> "(A) adequate prior notice of any investigation be given in writing to the judge or magistrate whose conduct is the subject of the complaint;
>
> "(B) the judge or magistrate whose conduct is the subject of the complaint be afforded an opportunity to appear (in person or by counsel) at proceedings conducted by the investigating panel, to present oral and documentary evidence, to compel the attendance of witnesses or the production of documents, to cross-examine witnesses, and to present argument orally or in writing; and

"(C) the complainant be afforded an opportunity to appear at proceedings conducted by the investigating panel, if the panel concludes that the complainant could offer substantial information.

Any rule promulgated under this subsection shall be a matter of public record, and any such rule promulgated by a judicial council may be modified by the Judicial Conference.

"(12) No judge or magistrate whose conduct is the subject of an investigation under this subsection shall serve upon a special committee appointed under paragraph (4) of this subsection, upon a judicial council, upon the Judicial Conference, or upon the standing committee established under section 331 of this

title, until all related proceedings under this subsection have been finally terminated.

"(13) No person shall be granted the right to intervene or to appear as amicus curiae in any proceeding before a judicial council or the Judicial Conference under this subsection.

"(14) All papers, documents, and records of proceedings related to investigations conducted under this subsection shall be confidential and shall not be disclosed by any person in any proceeding unless--

> "(A) the judicial council of the circuit, the Judicial Conference of the United States, or the Senate or the House of Representatives by resolution, releases any such material which is believed necessary to an

impeachment investigation on trial of a judge under article I of the Constitution; or

"(B) authorized in writing by the judge or magistrate who is the subject to the complaint and by the chief judge of the circuit, the Chief Justice, or the chairman of the standing committee established under section 331 of this title.

"(15) Each written order to implement any action under paragraph (6)(B) of this subsection, which is issued by a judicial council, the Judicial Conference, or the standing committee established under section 331 of this title, shall be made available to the public through the appropriate clerk's office of the court of appeals for the circuit. Unless contrary

to the interests of justice, each such order issued under this paragraph shall be accompanied by written reasons therefor.

"(16) Except as expressly provided in this subsection, nothing in this subsection shall be construed to affect any other provision of this title, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Appellate Procedure, or the Federal Rules of Evidence.

"(17) The Court of Claims, the Court of Customs and Patent Appeals, and the Customs Court shall each prescribe rules, consistent with the foregoing provisions of this subsection, establishing procedures for the filing of complaints with respect to the conduct of any judge of such court and for the investigation and resolution of such complaints. In investigating and taking action with respect

to any such complaint, each such court shall have the powers granted to a judicial council under this subsection.".

(b) The section heading for section 372 of title 28, United States Code, is amended to read as follows:

"§ 372. Retirement for disability; substitute judge on failure to retire; judicial discipline.".

(c) The item relating to section 372 in the section analysis for chapter 17 of title 28, United States Code, is amended to read as follows:

"372. Retirement for disability; substitute judge on failure to retire; judicial discipline.".

AUTHORITY OF THE JUDICIAL CONFERENCE

SEC. 4. The fourth undesignated paragraph of section 331 of title 28, United States Code, is amended to read as follows:

"The Conference shall make a comprehensive survey of the condition of business in the courts of the United States and prepare plans for assignment of judges to or from circuits or districts where necessary. It shall also submit suggestions and recommendations to the various courts to promote uniformity of management procedures and the expeditious conduct of court business. The Conference is authorized to exercise the authority provided in section 372(c) of this title as the Conference, or through a standing committee. If the Conference elects to establish a standing committee, it shall be appointed by the Chief Justice and all petitions for review shall be reviewed by that committee. The Conference or the standing committee may hold hearings, take sworn testimony, issue subpoenas and subpoenas duces tecum, and

make necessary and appropriate orders in the exercise of its authority. Subpoenas and subpoenas duces tecum shall be issued by the clerk of the Supreme Court or by the clerk of any court of appeals, at the direction of the Chief Justice or his designee and under the seal of the court, and shall be served in the manner provided in rule 45(c) of the Federal Rules of Civil Procedure for subpoenas and subpoenas duces tecum issued on behalf of the United States or an officer or any agency thereof. The Conference may also prescribe and modify rules for the exercise of the authority provided in section 372(c) of this title. All judicial officers and employees of the United States shall promptly carry into effect all orders of the Judicial Conference or the standing committee established pursuant to this section.".

ADMINISTRATIVE OFFICE OF UNITED STATES COURTS

SEC. 5. Section 604 of title 28, United States Code, is amended by adding at the end the following new subsection:

"(h)(1) The Director shall, out of funds appropriated for the operation and maintenance of the courts, provide facilities and pay necessary expenses incurred by the judicial councils of the circuits and the Judicial Conference under section 372 of this title, including mileage allowance and witness fees, at the same rate as provided in section 1821 of this title. Administrative and professional assistance from the Administrative Office of the United States Courts may be requested by each judicial council and the Judicial Conference for purposes of discharging their duties under section 372 of this title.

"(2) The Director of the Administrative Office of the United States Courts shall include in his annual report filed with the Congress under this section a summary of the number of complaints filed with each judicial council under section 372(c) of this title, indicating the general nature of such complaints and the disposition of those complaints in which action has been taken.".

AUTHORIZATION OF APPROPRIATIONS

SEC. 6. There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act.

EFFECTIVE DATE

SEC. 7. This Act shall become effective on October 1, 1981.

RULES OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

* * *

ADDENDUM THREE

RULE FOR THE CONDUCT OF COMPLAINT PROCEEDINGS UNDER 28 U.S.C.A. § 372(a)

Preface: Pursuant to 28 U.S.C.A. § 372(c)(11) the following rule is prescribed by the judicial council for the conduct of proceedings under § 28 U.S.C.A. § 372(c).

1. Any person alleging that a circuit, district or bankruptcy judge or a magistrate of this circuit has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or alleging that such a judge or magistrate is unable to discharge all of the duties of office by reason of mental or physical disability, may file with the clerk of the court of appeals

(hereinafter "the clerk") a written and signed complaint verified under oath or affirmation, containing a brief statement of the facts alleged to constitute such conduct. Anonymous complaints shall not be accepted. The complaint should be filed in a sealed envelope marked on the outside "Complaint of Judicial Misconduct filed by (name of complaining person)." No identification of the judge or magistrate whose conduct is the subject of the complaint shall appear on the outside of the envelope. If the clerk receives a complaint not sealed or not properly marked he shall seal and properly mark it.

2. Upon receipt of a complaint filed under ¶1 the clerk shall promptly transmit to the chief judge of the circuit, or, if the conduct complained of is that of the chief judge, to the circuit judge in regular active service next senior in date

of commission (hereafter included in the term "chief judge"). The clerk shall after unsealing the complaint, simultaneously transmit a copy of the complaint to the judge or magistrate whose conduct is the subject of the complaint, and reseal it.

3. After expeditiously reviewing the complaint, the chief judge, by written order stating his reasons, may:

(a) dismiss the complaint, if he finds it to be:

(i) not in conformity with ¶1, or

(ii) directly related to the merits of a decision or procedural ruling, or

(iii) frivolous; or

(b) conclude the proceeding if he finds that appropriate corrective action has been taken.

(c) refer the complaint to a screening panel appointed by him consisting of one circuit judge and one district judge for review and recommendation.

(d) in connection with the review and the determinations that may be made by him under this paragraph, the chief judge is authorized to require that information be furnished to him in writing by the complaining person, the judge or magistrate whose conduct is the subject of the complaint, and any

other persons or entities of the United States courts that he considers appropriate.

The chief judge shall transmit copies of his written order to the complainant and to the judge or magistrate whose conduct is the subject of the complaint.

4. If the chief judge does not enter an order under ¶3, he shall promptly:

(a) appoint himself and equal numbers of circuit and district judges of the circuit to a special committee to investigate the facts and allegations contained in the complaint;

(b) designate a bankruptcy judge or magistrate, as the case may be, to join the committee in an advisory capacity when

a bankruptcy judge or magistrate is the subject of the complaint;

(c) certify the complaint and any other documents pertaining thereto to each member of the committee; and

(d) provide written notice to the complainant and the judge or magistrate whose conduct is the subject of the complaint of the action taken under this paragraph.

5. (a) Each committee appointed under ¶4 shall conduct an investigation as extensive as it considers necessary and shall expeditiously file a comprehensive written report thereon with the judicial council. The report shall present the findings of the

investigation and the committee's recommendations for necessary and appropriate action by the judicial council.

(b) Adequate prior notice of any investigation under ¶5(a) shall be given in writing to the judge or magistrate whose conduct is the subject of the complaint, and such judge or magistrate shall be afforded an opportunity to appear (in person or by counsel) at proceedings conducted by the committee, to present oral and documentary evidence, to compel the attendance of witnesses or the production of documents, to cross-examine witnesses, and to present argument orally or in writ-

ing. The complainant shall be afforded an opportunity to appear at proceedings conducted by the committee, if it concludes that the complainant could offer substantial information.

6. Upon receipt of a report filed under ¶5 the judicial council may:

(a) conduct any additional investigation that it considers necessary;

(b) take such action as appropriate to assure the effective and expeditious administration of the business of the courts within the circuit, including, but not limited to, any of the following:

(i) directing the chief judge of the district of the judge or magistrate whose conduct is the subject of the com-

plaint to take such action as the judicial council considers appropriate;

(ii) certifying disability of a judge appointed to hold office during good behavior whose conduct is the subject of the complaint, pursuant to the procedures and standards provided under 28 U.S.C.A. § 372(b);

(iii) requesting that any such judge appointed to hold office during good behavior voluntarily retire, with provision that the length of service requirements under 28 U.S.C.A § 371 shall not apply;

(iv) ordering that, on a temporary basis for a time certain, no further cases be assigned to the judge or magistrate whose conduct is the subject of the complaint;

(v) censuring or reprimanding the judge or magistrate by means of private communication;

(vi) censuring or reprimanding the judge or magistrate by means of public announcement; or

(vii) ordering such other action as it considers appropriate under the circumstances, except that:

(I) in no circumstances may the judicial council order removal from office of any judge appointed to hold office during good behavior, and

(II) any removal of a magistrate shall be in accordance with Title 28 U.S.C.A. § 631, and any removal of a bankruptcy judge shall be in accordance with 28 U.S.C.A. § 153;

(c) The judicial council shall immediately provide written notice to the complainant and to the judge or magistrate of the action taken under this paragraph.

(d) Each written order to implement any action under this paragraph that is issued by the judicial council shall be made available to the public upon request through the office of the clerk. Unless contrary to the interests of justice, each such order issued under this paragraph shall be accompanied by written reasons therefor.

7. (a) In addition to the authority granted under ¶6, the judicial council may in its discretion refer any complaint made under § 372(c), together with the record of any associated proceedings and its recommendations for appropriate action, to the Judicial Conference of the United States.

(b) In any case in which the judicial council determines, on the basis of a complaint and an investigation under § 372(a), or on the basis of information otherwise available to it, that a judge appointed to hold office during good behavior has engaged in conduct:

(i) that might constitute one or more grounds for impeachment under Article I of the Constitution; or (ii) that in the interests of justice is not amenable to resolution by the judicial council, the judicial council shall promptly certify such determination, together with any complaint and a record of any associated proceed-

ings, to the Judicial Conference of the United States.

(c) The judicial council shall, unless contrary to the interests of justice, immediately submit written notice to the complainant and to the judge or magistrate whose conduct is the subject of the action taken under this paragraph.

8. A complainant, judge, or magistrate aggrieved by a final order of the chief judge under ¶3 may, within 30 days of the date of the order, petition the judicial council for review thereof. The council shall grant or deny the petition for review by a majority vote. A complainant, judge, or magistrate aggrieved by an action of the judicial council under

¶6 may, within 30 days from the date of the action, petition the Judicial Conference of the United States for review thereof.

9. No judge or magistrate whose conduct is the subject of an investigation shall serve upon a special committee appointed under ¶4, or upon the judicial council, until all related proceedings under § 372(c) have been finally terminated.

10. No person shall be granted the right to intervene or to appear as amicus curiae in any proceeding before the judicial council.

11. In conducting any investigations under § 372(c) the judicial council and any special committees appointed under ¶4 shall have full subpoena powers as provided in 28 U.S.C.A. §332. Subpoenas

shall be enforced as provided in Rule 45(f), Fed. Rules of Civil Procedure.

12. All papers, documents, and records of proceedings related to investigations conducted under § 372(c) shall be confidential and shall not be disclosed by any person in any proceeding unless:

(a) the judicial council, the Judicial Conference of the United States, or the Senate or the House of Representatives by resolution, releases any such material that is believed necessary to an impeachment investigation or trial of a judge under Article I of the Constitution; or

(b) authorized in writing by the judge or magistrate who is the subject of the complaint and by the chief judge, the Chief Justice of the United States, or the

chairman of the standing committee established under 28 U.S.C.A. § 331.

13. The clerk shall maintain files for the papers, documents, and records arising from proceedings taken pursuant to § 372(c), separate and apart from all other files and records. These files, except for public records, shall be maintained with appropriate security precautions.

14. The effective date of this rule is October 1, 1981. Complaints filed with the clerk or the chief judge of the Fifth Circuit before October 1, 1981 complaining of actions of a judge or a magistrate now in this circuit shall be processed and handled by this circuit as provided by resolutions of the judicial council of the Fifth Circuit in effect September 30, 1981.